89- 1486

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., AND MFR COURT STREET BOOKS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether, before it may enforce compliance with a grand jury subpoena for corporate business records, the government must establish that the subpoenaed materials would be relevant and admissible at a trial on the merits.

PARTIES TO THE PROCEEDING

In addition to the named parties, Model Magazine Distributors, Inc., was a party in the courts below.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 884 F.2d 772. Earlier opinions of the court of appeals (App., *infra*, 16a-18a, and 19a-56a) are reported, respectively, at 844 F.2d 202 and 829 F.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1989. A petition for rehearing was denied on December 12, 1989 (App., *infra*, 68a-69a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 17 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. Since 1986, a grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to Model Magazine Distributors, Inc. (Model), and two related companies, respondents R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR).[1] The subpoenas sought a variety of corporate books and records. See App., *infra*, 70a-82a. The grand jury subsequently issued two further subpoenas to Model. The first called for additional business records; the second requested one copy of each of 193 identified videotapes that Model had shipped into the Eastern District of Virginia. *Id.* at 83a-84a; see *id.* at 4a.

[1] The government had earlier sought to subpoena certain corporate records and videotapes in the possession of Model and another company, but the court of appeals had held those subpoenas to be too broad and too vague, and had refused to compel compliance with the subpoenas. See App., *infra*, 19a-56a.

2. Respondents moved to quash the subpoenas. Following extensive hearings in the United States District Court for the Eastern District of Virginia, the motions to quash were denied.

First, on June 17, 1988, Judge Hilton denied Model's motions to quash. App., *infra*, 57a-58a. The court found that the two subpoenas for business records were sufficiently specific. *Ibid.* It also upheld the subpoena for the 193 videotapes, concluding that the tapes were relevant to the government's investigation and that production of the tapes would not constitute a prior restraint. *Ibid.*

Second, on July 8, 1988, Judge Cacheris denied the motion by R. Enterprises to quash the subpoena for business records. App., *infra*, 59a-60a. The court found that the subpoena was "clearly delineated and not overly burdensome." *Id.* at 59a. The court also found a "sufficient connection" between R. Enterprises and the Eastern District of Virginia to warrant "further investigation by the grand jury." *Id.* at 60a. In particular, the court noted that Martin Rothstein, the owner of R. Enterprises, had admitted that R. Enterprises, MFR Books, and Model were "all the same thing." *Ibid.*

Finally, on August 12, 1988, Judge Ellis denied MFR's motion to quash the subpoena for business records. App., *infra*, 61a-64a. The court stated that it was "inclined to agree" with "the majority of the

jurisdictions," which do not require the government to make "a threshold showing" before a grand jury subpoena may be enforced. *Id.* at 63a. The court added, however, that "even assuming that the Fourth Circuit would require a threshold showing of relevance," the government had made such a showing in this case. *Ibid.* The court found sufficient evidence that respondents were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Ibid.* The court also found the subpoena to be appropriately "tailored." *Ibid.* Characterizing the subpoenas in this case as "fairly standard business subpoenas," which "ought to be complied with," *id.* at 65a, the district court denied the motion to quash. When the companies thereafter refused to comply, the court found them in contempt. *Id.* at 64a.

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-15a. Relying on *United States* v. *Nixon*, 418 U.S. 683 (1974), the court held that, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the government must "clear three hurdles" in order to secure the enforcement of a grand jury subpoena: "(1) relevancy; (2) admissibility; (3) specificity" (App., *infra*, 7a).[2] The court emphasized that unless grand jury subpoenas are held to such a threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." App., *infra*, 9a. "The test for enforcement," the

[2] The court of appeals "recognize[d] that the *Nixon* court was not reviewing a subpoena duces tecum in connection with a grand jury investigation," but it found the "interpretation of Rule 17(c)" articulated in the *Nixon* case "equally applicable in this case." App., *infra*, 7a n.2.

court explained, "is whether the subpoena constitutes 'a good faith effort to obtain identified evidence rather than a general "fishing expedition" that attempts to use the rule as a discovery device.'" *Ibid.* In order not to "undercut[] the strict limitation of discovery in criminal cases" (*ibid.*), the court held that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

Applying those standards, the court first upheld the subpoenas to Model for business records. App., *infra*, 7a-8a. It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a. In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

The court, however, quashed the subpoenas for the business records of MFR and R. Enterprises. App., *infra*, 8a-10a. The court explained that the government had adduced no evidence that those companies had done business in the Eastern District of Virginia; the court therefore "fail[ed] to see how the records of those companies are relevant to a grand jury investigation" in the district. *Id.* at 9a. In addition, the court stated, any evidence of activities by the target companies outside the State of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Id.* at 10a. Accordingly, the court held, the subpoenas "fail to meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Ibid.*

Finally, the court remanded Model's motion to quash the subpoena for videotapes. App., *infra*, 10a-15a. The court held that the subpoenaed films were not shown to be obscene and that the government had failed to establish the relevance of the films to the grand jury's investigation. *Id.* at 12a-14a & n.4. It also noted that there were "additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court." *Id.* at 13a.

On December 12, 1989, the panel denied the government's petition for rehearing. By a vote of 6 to 5, the full court of appeals denied rehearing en banc. App., *infra*, 68a-69a.

REASONS FOR GRANTING THE PETITION

Rule 17(c) of the Federal Rules of Criminal Procedure permits the recipient of a grand jury subpoena duces tecum to move to quash the subpoena on the ground that "compliance would be unreasonable or oppressive." Relying on Rule 17(c), the court of appeals agreed to quash two grand jury subpoenas for garden-variety business records because, in the court's view, the subpoenas did not "meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." App., *infra*, 10a.[3]

The court of appeals' decision is both unprecedented and unwise. The majority of circuits do not

[3] The court of appeals also vacated an order requiring compliance with the subpoena for videotapes. App., *infra*, 10a-15a. Although we disagree with that portion of the court's decision as well, we seek review only of that portion of the decision quashing the subpoenas for respondents' business records.

require the government to make *any* preliminary showing of relevance in order to secure compliance with a grand jury subpoena. And while two circuits have imposed a modest threshold requirement, no other circuit has gone as far as the Fourth Circuit, which has construed Rule 17(c) to require the government to make a threshold showing that evidence sought by the grand jury would be relevant and admissible at a trial on the merits. Because the court of appeals' novel standard for grand jury subpoenas is inconsistent with the decisions of this Court, conflicts with the approach taken by the majority of other circuits, and threatens to disrupt the ordinary operation of grand jury investigations, the petition for a writ of certiorari should be granted.

1. a. This Court has consistently recognized the broad scope of a grand jury's powers of investigation. "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments," a grand jury's "investigative powers are necessarily broad." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). While the powers of the grand jury are not unlimited, "the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, * * * is particularly applicable to grand jury proceedings." *Ibid.* Accord *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973).

Over the years, the Court has articulated three related principles designed to ensure that the grand jury can fulfill its broad investigative and accusatory mandate.

First, the Court has held that the rules and restrictions that apply at trial on the merits do not

apply in the same way to grand jury proceedings. Because it has "[t]raditionally * * * been accorded wide latitude to inquire into violations of criminal law," the grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Unlike the trial on the merits, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Ibid.*

For example, in *Calandra* the Court held the Fourth Amendment exclusionary rule inapplicable to grand jury proceedings. "Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." 414 U.S. at 349. Moreover, the Court emphasized, "[s]uppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Ibid.*

Similarly, in *Costello* v. *United States*, 350 U.S. 359 (1956), the Court refused to apply the rule against hearsay to grand jury proceedings. The American grand jury system, observed the Court, derives from the English model, under which the work of the grand jury "was not hampered by rigid procedural or evidential rules." *Id.* at 362. Indeed, the Court noted, grand jurors "could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory." *Ibid.* To impose the rule against hear-

say on the grand jury process, the Court explained, "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.* at 364. The Court sharply distinguished the rules that apply in the grand jury from those that apply at trial: "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Ibid.*

Second, the Court has emphasized that the rules applicable to grand jury proceedings must take into account the fact that "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg* v. *Hayes*, 408 U.S. at 701. "[T]he precise nature of the offense, if there be one," the Court has stated, is "developed at the conclusion of the grand jury's labors, not at the beginning." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Applying that principle, the Court has consistently held that the scope of the grand jury's inquiries cannot be confined by rules that depend, in any respect, on the outcome of the grand jury's efforts.

For example, in *Hale* v. *Henkel*, 201 U.S. 43 (1906), the Court rejected the contention that a witness may not be questioned prior to the return of an indictment. The Court explained that "[i]t is impossible to conceive that * * * the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be in-

dicted." *Id.* at 65. Accord *United States* v. *Dionisio*, 410 U.S. at 16.

More recently, in *Branzburg* v. *Hayes*, *supra*, the Court rejected the contention that before a grand jury may subpoena a reporter for his source of information, the government must show that a crime has occurred and that the information is not available elsewhere. The Court explained that "only the grand jury itself can make this determination," in that the grand jury's role "includes an investigatory function with respect to determining whether a crime has been committed and who committed it." 408 U.S. at 701. "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made." *Id.* at 701-702. As the Court summarized the point in *Blair* v. *United States*, 250 U.S. at 282, the scope of a grand jury investigation "is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

Third, the Court has emphasized that, in order to discharge its functions, the grand jury should not be interrupted by procedural detours. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. at 17. Accord *United States* v. *Calandra*, 414 U.S. at 350. As the Court explained in *Costello*, if a grand jury's work could be challenged on the grounds of adequacy or competence, "the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." 350 U.S. at 363.

b. The court of appeals' decision violates each of those three principles. First and foremost, the decision holds the grand jury to the same standards of relevance and admissibility that apply at trial. In the court's view, "any documents subpoenaed under Rule 17(c)"—whether subpoenaed by a grand jury during its investigation, or subpoenaed by the government after indictment and in preparation for trial—"must be admissible as evidence at trial" (App, *infra*, 10a). Applying that standard, the court quashed the subpoenas to R. Enterprises and MFR, concluding that evidence of activities outside of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* This was wrong: that standard ignores this Court's consistent distinction between the grand jury and trial settings and imposes on the grand jury process a rule of relevance that simply has no place in the investigative context.[4]

Second, the relevance standard adopted by the court of appeals depends, in principal part, on the outcome of the grand jury's business—who will be

[4] The court of appeals also made some rather doubtful assessments of relevance even under a trial standard. For example, the court surmised that out-of-state transactions conducted by Martin Rothstein through two of the corporate entities would not be admissible against him in a trial conducted in the Eastern District of Virginia. See App., *infra*, 10a. Under Fed. R. Evid. 404(b), however, that narrow construction of relevance seems problematic at best. Still less does such a restrictive view of relevance apply at the grand jury stage.

charged as defendants, and what the charges will be. Such a standard is entirely inconsistent with the principle that the grand jury's work cannot be confined by "forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. at 282. As this Court has noted, the grand jury "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Under the court of appeals' approach, however, a grand jury may subpoena only evidence that can be shown to be relevant to the charges that the grand jury will ultimately announce.

Finally, by affording targets a ready vehicle for challenging subpoenas—one that requires the government to show relevance and admissibility—the court of appeals has created a new means for delaying grand jury investigations. Targets of a grand jury investigation ordinarily have every incentive to defeat or at least delay the investigation, as well as to obtain information about the government's case. Indeed, trial practice guides for defense counsel specifically refer to numerous tactical advantages of such pretrial motions.[5] This Court's cases, however, strongly counsel against measures that would permit

[5] See, *e.g.*, 1 A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 172 (1984); 1. S. Allen, I. Rosen, D. Winston & J. Kruskal, *Criminal Defense Techniques* § 6A.02[5] (1988); B. Gershman, *Prosecutorial Misconduct* §§ 2.1-2.9 (1985); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 13.4(b) (3d ed. 1985).

such "undue interruption [of] the inquiry instituted by a grand jury." *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940).

2. There are two lines of authority within the circuit courts concerning motions to quash subpoenas duces tecum under Rule 17(c). In most circuits, the government need not make *any* preliminary showing of relevance—let alone a showing that the materials would be relevant at trial. Rather, under the majority rule, the initial burden falls on the recipient of the subpoena, which can obtain relief only if it can establish that the requested documents have no conceivable relevance to the subject of the grand jury's investigation. Two circuits, however, have required the government to make a preliminary showing that the subpoenaed records are relevant to a legitimate grand jury investigation. Although the Fourth Circuit's decision in the present case has features in common with the minority rule, it goes well beyond even that rule by requiring the government to establish the likely relevance of the subpoenaed documents at trial.

a. The majority rule is well settled. In *In re Grand Jury Subpoena* (*Battle*), 748 F.2d 327 (1984), for example, the Sixth Circuit refused to quash a grand jury subpoena seeking "all books, papers, records, memoranda and data" relating to certain discretionary bank accounts controlled by a former union official. The court rejected the official's contention that the government should be required to demonstrate the relevance of the requested records. Instead, the court explained, "[t]he burden is on the party seeking to quash the subpoena to show 'that the information sought bears "no conceivable relevance to any legitimate object of investigation by the federal grand

jury," * * * or that there has been 'harassment or prosecutorial misuse of the system.'" *Id.* at 330.

The Eleventh Circuit has likewise declined to require the government to make a preliminary showing of relevance in order to enforce a grand jury subpoena duces tecum. In *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (1982), cert. denied, 462 U.S. 1119 (1983), the recipient of a documents subpoena resisted production, contending that the government should first be required to show "that the documents sought are relevant to an investigation properly within the grand jury's jurisdiction and not sought primarily for another purpose." *Id.* at 1387. The court of appeals rejected that claim and enforced the subpoena. Acknowledging that the trial court had made no finding "that the documents sought were relevant or necessary for the grand jury's investigation," *ibid.*, the court flatly refused to devise any such requirement "absent some showing of harassment or prosecutorial misuse of the system." *Ibid.* To do so, the court reasoned, would "impose [an] undue restriction[] upon the grand jury investigative process." *Ibid.*

The Second Circuit likewise follows the majority rule. In *In re Liberatore*, 574 F.2d 78 (1978), the recipient of a grand jury subpoena duces tecum seeking handwriting exemplars and fingerprints contended that the government should be required to show the relevance and necessity of that information to the grand jury's investigation. After noting that the target had not preserved the issue for appeal, the court went on to reject the claim on the merits. The court explained that "the government does not in each and every case bear the constant burden of initially showing the relevance of the particular evi-

dence sought to be produced by way of subpoena." *Id.* at 83. "Instead," the court continued, "the party seeking to quash a subpoena must carry the burden of showing that the information sought bears 'no conceivable relevance to any legitimate object of investigation by the federal grand jury.'" *Ibid.*

The Ninth Circuit has also refused to impose on the government the requirement to make a threshold showing of relevance or necessity. For example, in *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (1983), a grand jury issued a subpoena to the former attorney of a target, seeking documents relating to the previous representation. The district court quashed the subpoena, stating that the government must first establish, by affidavit, the "legitimate need and relevance" of the requested information. *Id.* at 1222. The court of appeals reversed, holding that "[n]o affidavit of relevance and need must be introduced." *Id.* at 1223. The court explained that "[i]n view of the presumption that the government obeys the law . . . [there is] no reason to inject into routine grand jury investigations the delay and imposition upon district courts that will be opened up by a rule institutionalizing these disclaiming affidavits." *Ibid.* Accord *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977).

b. The Third Circuit, joined more recently by the Tenth Circuit, has long applied a somewhat different approach, requiring the government, in the first instance, to justify a subpoena duces tecum on relevance grounds. See *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 92-93 (3d Cir. 1973); *In re Grand Jury Subpoena Duces Tecum Issued on June*

9, 1982, 697 F.2d 277, 281 (10th Cir. 1983). In *Schofield I*, the Third Circuit, exercising its "supervisory powers," required the government to make a preliminary showing, by affidavit, that each item requested by the grand jury is "at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." [6] 486 F.2d at 93. The Third Circuit does not, however, require more than a minimal showing of relevance. For example, in *In re Appeal of Hughes*, 663 F.2d 282 (1980), the court found that the government had demonstrated the relevance of documents subpoenaed by the grand jury when it represented, by affidavit, that "the grand jury was conducting an investigation into specific federal crimes," that the requested documents would be relevant to that investigation, and that the information was not sought for an unrelated purpose. *Id.* at 287. The court noted that even a "cryptic" affidavit may satisfy the government's obligation under *Schofield I*. *Ibid.* See also *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d at 967.

c. Like the rule in the Third and Tenth Circuits, the Fourth Circuit's decision in the present case imposes a threshold obligation on the government to establish the relevance of the subpoenaed records. But

[6] Most circuits have explicitly rejected the Third Circuit's "Schofield" rule. See *In re Grand Jury Proceedings (85 Misc. 140)*, 791 F.2d 663, 665 (8th Cir. 1986); *In re Sinadinos*, 760 F.2d 167, 169 (7th Cir. 1985); *In re Grand Jury Subpoena (Battle)*, 748 F.2d at 330 (Sixth Circuit); *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d at 1387 (Eleventh Circuit); *In re Pantojas*, 628 F.2d 701, 704-705 (1st Cir. 1980); *In re Liberatore*, 574 F.2d at 83 (Second Circuit); *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d at 686 (Ninth Circuit).

the decision below goes well beyond the minority rule. To satisfy the court of appeals' standard, the government must prove that the requested documents are relevant not merely to the *grand jury's investigation*, but also to the *likely charges at trial*. No other court of appeals—not even the Third and Tenth Circuits—has taken so restrictive a view of the grand jury's subpoena power.

By superimposing on the grand jury system a set of trial-related requirements, the court of appeals lost sight of the critical differences between those two distinct stages of the criminal justice system. And in the process, the court has devised a blueprint for grand jury delay and disruption—a lesson that will not be lost on future recipients of grand jury subpoenas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 88-5619, 88-5620

IN RE GRAND JURY 87-3 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLEE.

IN RE GRAND JURY 87-4 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLANT

Decided Aug. 31, 1989

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

ERVIN, Chief Judge:

These cases concern the question of whether subpoenas duces tecum which seek the production of certain corporate records as well as video tapes presumptively protected by the first amendment meet the relevancy, admissibility, specificity and necessity requirements of Fed.Rule Crim. Pro. 17(c). We affirm

the district court's refusal to quash the subpoena issued to Model Magazine Distributors, requesting the company's corporate records. We find, however, that the government failed to demonstrate the relevance of either the corporate records requested from R. Enterprises, Inc. and MFR Court Street Books, Inc. or of the 193 named video tapes requested from Model Magazine. The government also failed to offer any evidence showing that the subpoena was a necessary tool for obtaining copies of the video tapes. For these reasons we reverse the district court's refusal to quash the subpoenas issued to R. Enterprises and MFR Court Street Books. We also remand the motion to quash the subpoena issued to Model Magazine requesting copies of the 193 video tapes, for further inquiry into both the relevancy of these tapes and the necessity of employing a subpoena duces tecum to obtain them.

I.

Factual and Procedural Background

These cases arise on a motion to stay a contempt order. The parties addressed the merits of the appeal in their briefs and oral arguments. We therefore decide the issues before us on the merits, rather than limiting our consideration to the request for a stay. Appeal of a civil contempt order is proper in this context. *See United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 542, 84 L.Ed. 783 (1940).

A party who chooses to subject himself to the risk of fines and imprisonment due to contempt can contest the validity of a subpoena in the role of contemner. If the subpoena is even partially bad, the contempt conviction should be reversed. *See Bowman*

Dairy Co. v. United States, 341 U.S. 214, 221, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951).

The subpoena duces tecum at issue arose out of a federal grand jury investigation in Virginia concerning the distribution of obscene materials. Subpoenas duces tecum were originally served on Model Distributors and Metro Video Distributors in October, 1986. Those subpoenas requested certain corporate records, as well as "one copy of any video tape cassette, 8 mm film or 16 mm film" that depicted specified types of conduct, which would render the films legally obscene. The subpoenas also demanded documents related to any tapes involving the listed categories of sexual activity. Both Model and Metro Video refused to comply with the subpoenas arguing that they were "unreasonable and oppressive," in violation of Fed.R.Crim.Pro. 17(c). The district court denied the companies' motions to quash the subpoenas, and found both parties in contempt.

On appeal, this court reversed the district court's findings as to reasonableness and burdensomeness under Rule 17(c), and quashed the subpoenas. *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 (4th Cir.1987), *reh'g denied*, 844 F.2d 202 (1988) ("*Model* I"). We found that the subpoenas did not meet the requirements of Rule 17(c) because:

> The presumptively protected materials they seek are otherwise procurable, and in a less intrusive manner; the specificity of the subpoenas is illusory, since the categories described do not refer to particular tapes; as a result, the corporations before us would be required to perform burdensome searches and would be at risk for failing to fulfill vague requirements; in sum, the govern-

ment appears to be engaging in a paradigmatic "fishing expedition."

829 F.2d at 1302.

Following our decision in *Model* I, the grand jury issued new subpoenas to Model, R. Enterprises [1], and MFR Court Street Books, Inc. on April 22, 1988. All three of these corporations are owned and operated by Martin E. Rothstein. When served with the subpoenas for these three corporations, Mr. Rothstein told an FBI agent that the entities were "all the same thing, I am the president of all three."

Model partially complied with the April 22 subpoena, but refused to produce "standard" corporate books and records (i.e. the general ledger, the disbursements journal, and banking records). The company based its refusal to comply fully on the grounds that it was no longer doing business in Virginia, and that the documents were not relative to a grand jury investigation in Virginia.

On June 2, 1988, the grand jury issued two new subpoenas to Model. The first again requested specific business records, and the second sought one copy of each of the 193 video cassettes Model had shipped to retailers in the Eastern District of Virginia. The 193 titles had been disclosed in Model's invoices supplied pursuant to the 1986 subpoena.

All three companies eventually moved to quash the various subpoenas. On June 17, 1988 the district court denied Model's motion to quash the subpoena requesting the 193 video tapes. The court found the

[1] A subpoena was originally issued to Coast-to-Coast Video, rather than R. Enterprises. The grand jury subsequently issued a subpoena to R. Enterprises d/b/a Coast-to-Coast.

subpoena satisfied the specificity standards suggested in *Model* I, and that the tapes were relevant to the government's investigation. The district court also denied Model's motion to quash the business records subpoenas issued to the company, and ordered the production of those records. The court found that those subpoenas were not overbroad.

On July 8, 1988 the district court denied R. Enterprises, Inc.'s motion to quash the records subpoena issued to it. The trial judge found that the subpoena was not overbroad, and that given Rothstein's admission that the three companies were the "same thing," there existed a sufficient connection with Virginia to warrant further grand jury investigation.

On August 22, 1988 the district court ordered MFR to comply with the records subpoena issued to it. The court found that Model, MFR, and R. Enterprises were one and the same, and that there was evidence that at least one of the entities, Model, had shipped material into the Eastern District of Virginia. Therefore, the lower court reasoned, the material sought from MFR was relevant. The court also found that the subpoenas were not indefinite or burdensome, and that they did not impermissibly chill first amendment rights.

On August 18, 1988 the district court found Model, MFR, and R. Enterprises, Inc. in contempt for failure to comply with orders to produce the subpoenaed materials. The court fined each company $500.00 per day, but stayed imposition of the fines until August 22, 1988, pending appeal. This court subsequently stayed the district court's contempt order retroactive to its date of entry, pending this appeal.

II.
Rule 17(c)

The subpoenas duces tecum challenged in this case were issued pursuant to Fed.R.Crim.Pro. 17(c), which provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit [them] to be inspected by the parties and their attorneys.

In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Supreme Court held that a subpoena issued pursuant to Rule 17(c) is not "unreasonable or oppressive" if the party seeking its enforcement can demonstrate:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

418 U.S. at 699-700, 94 S.Ct. at 3103.[2] Against this background, the court concluded, the government, "in order to carry [its] burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." 418 U.S. at 700, 94 S.Ct. at 3103.

The determination of whether a subpoena duces tecum issued under Rule 17(c) is either unreasonable or oppressive is "committed to the sound discretion of the trial court." *Nixon, supra*, at 702, 94 S.Ct. at 3105. Thus, an appellate court will not ordinarily disturb a finding that a subpoena complies with Rule 17(c) unless it determines that the trial court's finding was arbitrary, or without support in the record. *Id.*

III.
Business Records Subpoenas

Our only concern with respect to the business records requested from Model, R. Enterprises, and MFR is the relevancy of those documents to the grand jury's investigation.

A. *Model Magazine*

The grand jury is investigating the possibility that Model shipped obscene materials into, and distributed them within, the Eastern District of Virginia. Such conduct could be found to violate 18 U.S.C. § 1465 (1982)[3], which prohibits the transportation of obscene matters for sale or distribution.

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[2] We recognize that the *Nixon* court was not reviewing a subpoena duces tecum in connection with a grand jury investigation, but we find that its interpretation of Rule 17(c) is equally applicable in this case.

[3] The statute provides in relevant part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any

We do not doubt the relevance of Model's business records to this investigation, as those records will most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state. Nor do we doubt the necessity of a subpoena to obtain those records, as logically they are available only from the company itself. We therefore affirm the district court's refusal to quash the subpoena requesting Model's corporate records.

B. *MFR and R. Enterprises*

The government does not allege, and the record contains absolutely no evidence indicating, that either MFR or R. Enterprises has ever shipped materials into, or otherwise conducted business in, the Eastern District of Virginia. The district court found that the business records of these two companies were relevant to the investigation of Model because MFR, R. Enterprises and Model are all owned by the same individual, Martin Rothstein. The lower court apparently believed that Rothstein's ownership of the three companies, in conjunction with the evidence demonstrating that Model shipped allegedly pornographic material into the Eastern District of Virginia, gives rise to an inference that MFR and R. Enterprises also transacted business in that location. In the absence of any evidence linking MFR and R.

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obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

Enterprises with the Eastern District of Virginia, however, such an inference is arbitrary at best.

Rule 17(c) was not intended to provide a means of discovery in addition to that provided by Fed.R. Crim.Pro. 16. *See Bowman Dairy Co., supra,* 341 U.S. at 221, 71 S.Ct. at 679. In reviewing motions to quash subpoenas issued under 17(c), the federal courts have acted with great care to insure that the rule "is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases." *United States v. Cuthbertson,* 630 F.2d 139, 146 (3d Cir.1980). The test for enforcement is whether the subpoena constitutes "a good faith effort to obtain identified evidence rather than a general 'fishing expedition' that attempts to use the rule as a discovery device." *Id.* at 144. *See also Bowman Dairy Co., supra,* 341 U.S. at 220-21, 71 S.Ct. at 678-79; *United States v. Layton,* 90 F.R.D. 514, 526 (N.D.Ca.1981).

The grand jury's request for these records appears to be premised on nothing more than a hope that the documents will reveal a tie between the companies and Virginia. "Mere hope," however, does not justify the enforcement of a subpoena under Rule 17(c). *Cuthbertson, supra,* 630 F.2d at 146. *See also Gilmore v. United States,* 256 F.2d 565, 568 (5th Cir.1958). The government must offer some evidence of a connection between MFR and R. Enterprises and Virginia before it can subpoena the companies' business records under 17(c). Because the government has offered no such evidence, we fail to see how the records of those companies are relevant to a grand jury investigation in the Eastern District of that state. In the absence of such evidence, enforcement of the subpoena would indeed allow the government to engage in a fishing

expedition, in the hopes of turning up incriminating evidence.

We also note that any evidence concerning Mr. Rothstein's alleged business activities outside of Virginia, or his ownership of companies which distribute allegedly obscene materials outside of Virginia, would most likely be inadmissible on relevancy grounds at any trial that might occur. This is true even if one views the grand jury as investigating Martin Rothstein, rather than Model Magazine. It would appear, therefore, that these subpoenas fail to meet the requirements [*sic*] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial. *See Nixon supra*, 418 U.S. at 700, 94 S.Ct. at 3103.

IV.

Video Tapes Subpoena

One of the primary concerns voiced by this court in *Model* I was the lack of specificity in the subpoenas at issue. Rather than requesting specific videotapes, the subpoena required Model to produce any video tapes that met a certain description detailed in the subpoena. We refused to enforce the subpoena because *inter alia*, its specificity was "illusory, since the categories described do not refer to particular tapes." *Model* I, *supra*, 829 F.2d at 1302. Although the subpoenas before us on this appeal do request the video tapes by title, we cannot find, on the record before us, that they satisfy either the relevancy or necessity requirements of Rule 17(c).

The commercial sale or exhibition of films is a form of expression strictly protected by the first amendment. *Joseph Burystn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S.Ct. 777, 780-81, 96 L.Ed. 1098 (1952). Thus, "the first amendment context of these

proceedings heightens the concern about burdensomeness and fourth amendment violations." *Model* I, *supra*, 829 F.2d at 1296. Taking these concerns into account in *Model* I, we quashed the subpoenas duces tecum not only because of their "illusory specificity," but also because "the presumptively protected materials they seek are otherwise procurable, and in a less intrusive manner." *Id.* at 1302. Such a ruling was required by *Nixon*, which held that the material sought by a subpoena duces tecum must not be "otherwise procurable reasonably in advance of trial by exercise of due diligence." *Nixon*, supra, 418 U.S. at 699, 94 S.Ct. at 3103.

Model contends that the subpoena duces tecum in this case is invalid because there has been no preliminary determination of whether there is probable cause to believe that the subpoenaed films are obscene. We disagree and reject Model's assertion that a finding of probable cause with respect to each item must precede issuance of a subpoena duces tecum in the context of materials presumptively protected by the First Amendment. No precedent exists for importing the full panoply of Fourth Amendment protections into the area of grand jury subpoenas and indeed to do so would transform this area of law substantially. A subpoena does not present the same kind of potential for intrusion upon the rights of privacy that a forcible search entails, and the resulting safeguards are therefore different. *See, e.g., United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (subpoena compelling an individual to appear before grand jury does not constitute a Fourth Amendment "seizure").

Rather, we think that Model's protections lie not in the prior review which it seeks but in its own mo-

tion to quash. It is open to Model to object to the subpoena duces tecum as being "unreasonable or oppressive." Fed.R.Crim.Proc. 17(c). *See In re Grand Jury Subpoena*, 829 F.2d at 1305-07 (discussing the requirements for a valid grand jury subpoena). In this regard, if Model moves to quash the subpoena on the grounds that one or more of the films sought is not obscene, the district court must then undertake an *in camera* review of those films under the relevant legal definition of obscenity. *See Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). If, during the course of its review, the court determines that protected films have been sought, the subpoena is invalid and must be quashed in its entirety.

We think this safeguard necessary to prevent overbroad subpoenas of films which are clearly protected by the First Amendment. Indiscriminate grand jury subpoenas of protected films could easily convey the impression that erotic or sensual depictions of any sort—including those that are not obscene—open their possessor to criminal prosecution. The fact that a particular film has been subject to subpoena may itself inhibit its display and distribution. The chilling effect of such sweeping and indiscriminate uses of the subpoena power is anything but fanciful; it is altogether real. On the other hand, we see no basis to retard the workings of the grand jury with the kind of burdensome procedures for prior review which appellant requests. Rather, our approach permits a grand jury to investigate criminal obscenity but prevents the grand jury from inhibiting presumptively protected expression which may not be obscene.

We also note that there is an additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court. This method would involve simply "buying the tapes and then subjecting them to a determination of obscenity in the eyes of the grand jury or a magistrate before issuing a subpoena duces tecum for particular tapes." *Model* I, *supra*, 829 F.2d at 1301. This court is acutely aware that in other pornography investigations the federal government has employed agents to deal in the purchase, sale and distribution of allegedly obscene material. *See, e.g., United State v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 484 U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 679 (1988). We fail to see why the government, in this case, refuses to obtain a copy of the requested videos by simply purchasing them.

Next, it appears to us that the government failed to establish the relevance of these video tapes to the grand jury investigation. In a case such as this the government "bears the burden of showing in what respect the [items] sought are material to any issue in the case. A mere hope that the [tapes], if produced, would contain evidence favorable to the [prosecution's] case will not suffice." *Layton, supra*, 90 F.R.D. at 516. *See also, United States v. Bookie*, 229 F.2d 130 (7th Cir.1956).

Having never viewed any of the 193 films in question, the government is unable to allege with any degree of certainty that these presumptively protected materials are in fact obscene. The allegations of the video's obscene nature, and therefore of their relevance, rest solely on the titles of the films.[4] Merely

[4] A random sample of the subpoenaed movies gives us these titles: "Down and Out in New York City", "Wild, Wild West",

alleging that the title of a film sounds "obscene", without offering a basis for this belief, does not satisfy the relevancy requirement of Rule 17(c). In essence the government is arguing that it cannot know if the material is obscene, and therefore relevant to its case, until it has examined it. By this argument the government is essentially "asking us to allow [them] to use Rule 17 as a device to embark on a fishing expedition.'" *Layton, supra*, 90 F.R.D. at 517.

With respect to materials presumptively protected under the first amendment, the government should be prepared to offer more evidence than the title of a work to prove its relevance to a pornography investigation. That evidence could include, but is by no means limited to, descriptions of the film found in the distributor's own promotional material or elsewhere.

We are unable to tell from the record what findings, if any, the district court made with respect to the relevancy of the named video tapes to the grand jury's investigation, or the necessity of a subpoena duces tecum as a tool for obtaining those tapes. For this reason we remand to the district court Model's motion to quash the subpoena requesting the movies, so that such findings can be made and incorporated into the record.

For the reasons set forth herein, we quash the subpoena duces tecum requesting the business records of R. Enterprises, Inc. and MFR Court Street Books, Inc. and we reverse those companies' convictions for civil contempt. We uphold the subpoena duces tecum

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"Working Girls", "69th Street Vice", "Having It All", "Tickled Pink", "A Little Romance", "Summer Break", "Charm School", and "Wild Things". We fail to see what, if anything, about these titles indicates anything of a sexual nature, much less obscenity.

requesting certain business records from Model Magazine, and we remand to the district court Model's motion to quash the subpoena duces tecum requesting one copy of each of the 193 named video tapes for findings regarding relevance and necessity.[5] Finally, we reverse Model's contempt conviction based on the company's refusal to turn over the requested tapes.

AFFIRMED IN PART, REVERSED IN PART, REMANDED IN PART.

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[5] We again note that the video tapes subpoena was addressed only to Model. No video tapes were requested from either R. Enterprises or MFR.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 86-5159(L), 86-5170, 86-5171 and 86-5173

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (MODEL MAGAZINE),
DEFENDANT-APPELLANT

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (MODEL MAGAZINE),
DEFENDANT-APPELLANT

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (METRO VIDEO),
DEFENDANT-APPELLANT

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (METRO VIDEO),
DEFENDANT-APPELLANT

Decided April 19, 1988

Before PHILLIPS, ERVIN, and WILKINSON, Circuit Judges.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC.

PER CURIAM:

This court held that certain grand jury subpoenas duces tecum issued in the course of a government pornography investigation must be quashed, and reversed district court orders holding the subjects of the subpoenas in contempt for refusing to comply with them. *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 (4th Cir.1987). Now before the court is the government's Petition for Rehearing with Suggestion for Rehearing En Banc in this case. On the basis set forth in this per curiam opinion, we deny the petition.

In its Petition for Rehearing with Suggestion for Rehearing En Banc, the government confessed the error of the position that it urged before this panel.

The government now concedes that "to the extent they require production of tapes with "lascivious (lewd, lustful) exhibition of the genitals or pubic area,' these subpoenas are overbroad." Because of this admission, the government necessarily agrees with the result reached in the panel's opinions; a subpoena that is invalid even in part must be quashed. *See Bowman Dairy v. United States*, 341 U.S. 214, 221, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951).

For the reasons expressed in the earlier majority opinion and separate concurring opinion in this case, that part of the subpoena which sought "lewd and lascivious" displays is impermissibly vague and overbroad. *See In re Grand Jury Subpoena supra.* The government's confession of error on this point and acquiescence as to the invalidity of the subpoena thus present a wholly sufficient ground for the resolution of this controversy. We now conclude, therefore, that our final disposition of this case should rest upon this ground alone, and we decline to address any further questions raised in the case prior to the government's change of position.

Because we now confine the holding in this case to the impermissible vagueness and overbreadth of the "lascivious (lustful, lewd) exhibition" portion of the subpoena, no basis remains for a rehearing or rehearing en banc. The contempt orders are reversed and the government's petition for rehearing and suggestion for rehearing en banc is therefore

DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 86-5159(L), 86-5171

IN RE GRAND JURY SUBPOENA:
SUBPOENA DUCES TECUM, PETITIONER (FOUR CASES)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (MODEL MAGAZINE),
DEFENDANT-APPELLANT (TWO CASES)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN DOE 819 (METRO VIDEO),
DEFENDANT-APPELLANT (TWO CASES)

Decided Sept. 24, 1987

Before PHILLIPS, ERVIN and WILKINSON, Circuit Judges.

ERVIN, Circuit Judge:

These cases concern the permissible breadth and requisite specificity of a subpoena duces tecum that seeks the production of materials that are presumptively protected under the first amendment to the

United States Constitution. The cases arise on a motion to stay a contempt order. In their briefs and oral arguments the parties addressed the merits of the appeal from the contempt order. We therefore treat the issues before us on the merits, instead of limiting our consideration to the narrower request for a stay. Appeal of a civil contempt order is proper in this context. *See United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 542, 84 L.Ed. 783 (1940).

A party who chooses to run the risk of fines and imprisonment due to contempt can contest the validity of a subpoena in the role of contemner. If the subpoena is even partially bad, the contempt conviction should be reversed. "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad." *Bowman Dairy v. United States*, 341 U.S. 214, 221, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951).

The subpoenas duces tecum involved in these cases were served upon appellants Model Distributors and Metro Video Distributors in October, 1986. Appellants, corporations located in New Jersey and New York, are apparently suspected by the government of having sent obscene videotapes into the Washington, D.C. metropolitan area for commercial purposes.[1] The

[1] Such activity could be found to violate 18 U.S.C. § 1465 (1982), which prohibits the transportation of obscene matters for sale or distribution:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture,

government issued the subpoenas duces tecum in connection with a grand jury investigation into the distribution of obscene materials. The original subpoenas duces tecum were exactly alike. They sought:

> 1. Corporate tax returns for the years 1980 through 1985.
>
> 2. Any and all original records and documents including but not limited to: correspondence, notes, letters, invoices, memoranda, messages, receipts, shipping invoices and records, orders for merchandise, films and video tapes, contracts, license agreements, etc.; in other words, any and all records or documents between, to, from or concerning any of the following entities from 1980 to the present: [naming 11 entities].
>
> 3. One copy of any video tape cassette, 8 mm film or 16 mm film that visually depict [*sic*] any of the following:
>
> (a) the use of a minor engaging in sexually explicit conduct, that is:
>
> (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;
>
> (2) bestiality;
>
> (3) masturbation;
>
> (4) sadistic or masochistic abuse; or
>
> (5) lascivious (lewd, lustful) exhibition of the genitals or pubic area.

film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

(b) adults engaging in sexually explicit conduct, that is:

(1) sexual intercourse, involving oral-genital, anal-genital or oral-anal, whether between persons of the same sex or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious (lewd, lustful) exhibition of the genitals or pubic area.

4. For the period 1980 to the present any and all documents and records concerning, referring to, naming, listing or in any way dealing with any visual depictions, i.e., video tape cassettes, 8 mm films, 16 mm films, etc., where the production of such visual depiction involves: [same categories as above, (a) and (b)].

5. For the period 1980 to the present any and all records and documents that reflect the payment of any things of value including, but not limited to, cash, money, checks, commissions, gifts and gratuities to any officer, employee, consultant, agent or in other words any payment of anything of value made to any individual or entity on behalf of [name of party], including, but not limited to: Forms W-2, 1099, 941 and 940, employee payroll ledgers, payroll account bank statements, cancelled checks, deposit tickets and debit/credit memoranda.

6. For the period 1980 to the present any and all cash recepits, records, cash disbursement records, general journals and ledgers including, but not limited to:

(a) invoices (sales and creditors and shipping receipts);

(b) accounts receivable/payroll;

(c) bank statements, cancelled checks, deposit tickets and debit/credit memoranda; and

(d) records of inventory.

The government met with counsel and the custodian of records for Metro Video Distributors and agreed to modify the subpoena duces tecum in several ways. In particular, Metro Video Distributors explained that it did not deal in tapes involving minors as specified in items 3(a) and 4(a) of the subpoena, so that compliance would consist in a custodian's explaining to the grand jury that no such tapes or records existed. The government postponed compliance on several other items. After a later meeting between the United States Attorney and counsel for Metro Video Distributors, the government agreed to limit the required production under items 3 and 4 to "only those titles which you characterize as x-rated." Model Distributors did not negotiate an agreement with the government.

Both Metro Video Distributors and Model Distributors moved to quash their subpoenas duces tecum in the United States District Court for the Eastern District of Virginia. At separate hearings before the same district court judge, the appellants argued that the production of tapes called for in item 3 of the subpoenas duces tecum was overly burdensome and violated their rights under the first and fourth amendments to the United States Constitution. The district court judge agreed with the government that production of the videotapes was not overly burdensome because the categories in the sub-

poenas duces tecum were specific. The government urged, and the court accepted, that a business enterprise, no matter how large, that sells videotapes will be familiar enough with the contents of those tapes to comply with subpoenas duces tecum such as these in a relatively short amount of time.

Metro Video Distributors claims to be one of the world's largest distributors of videotapes, with over 200 employees in seven areas around the country and Puerto Rico. Its inventory of videotapes purportedly exceeds 85,000 titles. Metro Video Distributors claims that less than one percent of the tapes that it distributes could be considered "x-rated and/or obscene." In response to the subpoena duces tecum, Metro Video Distributors identified 141 x-rated tapes. However, at the time of the district court's refusal to quash the subpoena, Metro Video Distributors indicated that it would refuse to comply with the item 3 request for the tapes in order to preserve its right to appeal in the posture of a contemner.

Model Distributors claims to distribute roughly 6,000 magazines and paperbacks and approximately 3,000 videotapes each week. Like Metro Video Distributors, it denies handling any items that involve child pornography, although it apparently has, to date, refused to place a corporate custodian on the stand to so testify. Model Distributors claimed in the district court that it had roughly 2,000 videotapes that might contain material described in the subpoena duces tecum that it had received.[2] Both appellants

[2] The government has collected all the catalogs, flyers and brochures that Model Distributors uses to solicit business. On the basis of these solicitation materials, the government claims that Model Distributors has, at most, 313 tapes for sale. The discrepancy—between the 2,000 and 313 figures—might be

point out that the titles of videotapes in their inventory and the boxes in which those videotapes are stored do not indicate whether any particular tape contains a "lewd display of genitals" or other form of sexual activity specified in the subpoenas.[3]

explained by means of the theory that the government advanced at oral argument. The government denied that it could simply put in a purchase order for all the types of tapes that it wanted, because Model Distributors might have other tapes that it was not currently marketing. Whatever the explanation, our analysis of burdensomeness is the same for the 141 tapes of Metro Video Distributors, as well as for the tapes in the possession of Model Distributors, whether those tapes number 313 or 2,000.

[3] The government produced an affidavit from an agent of the Federal Bureau of Investigation to which was attached a copy of Metro Video Distributors' Fall 1986 catalog for "X-rated Cassettes." The agent claimed that "by their very title I believe [they] may be obscene." There was no claim that the agent had purchased or viewed any films distributed by either appellant. Perhaps the special training of this agent has heightened his perceptual abilities beyond those of this court; however, it is hard to see what in these titles establishes good cause to believe that they fall into one of the subpoenaed categories. The first five titles are: "8 to 4," "Adam and Yves," "Adventure in San Fenleu," "Adventures of Rick Quick," and "Afternoon Delights." Some further suggestive entries are "Aunt Peg Goes to Hollywood," "Bodacious Ta-Tas," "If My Mother Only Knew," "The Postgraduate," and "Wanda Whips Wall Street."

After oral argument, the government produced an affidavit of a Model Distributors employee that suggests that salesmen can produce individual tapes that conform to the categories in the subpoena duces tecum. Besides the fact that this affidavit was not before the district court prior to the contempt ruling, it does not establish that either appellant knows the contents of its entire inventory well enough to comply without viewing many tapes.

For the purposes of this appeal, we deal only with those items in the subpoenas duces tecum calling for production of videotapes, packaging in which those tapes are contained,[4] and documents related to tapes involving listed categories of sexual activity. The requests for business records otherwise appear to be clearly delineated and not overly burdensome. It is only as to those items that require a prior identification of videotapes that we are troubled.

Model Distributors refused to produce the requested tapes or the boxes and containers in which they were stored, or documents relating to the sale of such tapes. It is unclear in the record before us whether business and tax records not linked to the videotapes have been satisfactorily produced. Metro Video Distributors apparently complied with the request for tax records and business dealings, but refused to deliver tapes conforming to the subpoena duces tecum.

The district court judge held Model Distributors in civil contempt and assessed a fine of $1000 for every day that it refused to comply with item 3 of the subpoena. The district court judge refused to stay this order pending appeal. Model Distributors applied for and received a stay from a panel of this court, pursuant to Fed.R.App.P. 8(a). Metro Video Distributors went before the district court thereafter and was held in civil contempt and assessed the same fine. Since we had already granted the motion of Model Distributors for a stay of its contempt order, the district court stayed the contempt order against Metro

[4] The government served a second subpoena on Model Distributors on the date of its initial hearing before the district court judge. This subpoena sought the cartons, boxes, and containers used to store the videotapes referred to in item 3 of the original subpoena.

Video Distributors until December 9, 1986, the date on which we had scheduled expedited oral argument by Model Distributors. We consolidated the motions for purposes of oral argument, and have extended the stay of the contempt order against Metro Video Distributors.

I.

Model Distributors and Metro Video Distributors argue that the subpoenas duces tecum involved in these cases are of unprecedented breadth, at least compared to other subpoenas for materials presumptively protected by the first amendment.[5] They assert

[5] That these videotapes are presumptively protected is clear. *See, e.g., Burstyn v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1951). The government's assertion that the categories of sexual activity to which the subpoenas duces tecum refer are the same as those categories mentioned in *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973), does not transform the subpoenaed materials into "preseumptively obscene" matter outside of first amendment protection. It remains true that "[s]ex and obscenity are not synonymous," *Roth v. United States*, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (1957), so that the graphic depiction of sexual activity does not automatically push material beyond first amendment pale. The *Miller* definition of obscenity includes the requirements of "an average person, applying contemporary community standards," finding "the work, taken as a whole" appealing to "the prurient interests," 413 U.S. at 24, 93 S.Ct. at 2615, as well as the requirement of no "serious literary, artistic, political, or scientific value." *Id.* All of these guidelines must be considered by a trier of fact before material is legally considered "obscene." That is not an easy task for a neutral, detached magistrate. *See* Lockhart, "Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment," 9 Ga.L.Rev. 533, 545-56 (1975); Gelhorn, "Dirty Books, Disgusting Pictures, and Dreadful Laws," 8 Ga.L.Rev. 291, 294-301 (1974). It is

that these subpoenas are "unreasonable and oppressive" in violation of FedR.Crim.P. 17(c),[6] that they constitute a prior restraint and will have a severe chilling effect on distribution of non-obscene videotapes, in violation of the first amendment to the United States Constitution, and that they amount to an unreasonable search and seizure in violation of the fourth amendment.[7] These claims must be con-

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obviously not a task that the government can shift to a private party merely by issuing a subpoena duces tecum listing categories of sexual activity. Nor do we think that the affidavit of the FBI agent, *supra* note 3, could possibly move all of the appellants' inventory outside first amendment protection. The agent did not even claim to have seen any tapes.

[6] (c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. *The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.* Fed.R.Crim.P. 17(c) (emphasis added).

[7] Appellants also appear to have advanced the argument below that production of the subpoenaed documents would violate their fifth amendment privileges under the "act of production" doctrine. *See United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984); *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). The fifth amendment claim has not been advanced on appeal. We note in passing that this circuit has explicitly held that *Doe* did not change the long-standing rule that collective entities cannot assert fifth amendment privileges, for which see *Bellis v. United States*, 417 U.S. 85, 88, 94 S.Ct. 2179, 2183, 40 L.Ed.2d 678 (1974), and that in the case of summonses for corporate documents, an individual's "act of production" privilege will not bar enforcement against the corporation. *See United States v. Lang*, 792 F.2d 1235 (4th Cir. 1986); *see also In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857 (8th Cir. 1986), *cert. dismissed, See v. United States*, —— U.S. ——, 107 S.Ct. 918, 93 L.Ed.2d 865 (1987); *In re Grand Jury Subpoena Duces Tecum*, 769 F.2d 52 (2d Cir. 1985).

sidered together, because the first amendment context of these proceedings heightens the concern about burdensomeness and fourth amendment violations. Although there are no directly applicable privileges arising out of the constitutional claims in these cases, those constitutional claims do color the analysis of burdensomeness under Fed.R.Crim.P. 17(c).

It is well established that a district court judge normally has considerable discretion in making findings under Fed.R.Crim.P. 17(c), at least outside the first amendment context. *See, e.g., United States v. Nixon*, 418 U.S. 683, 702, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974); *Matter of Klein*, 776 F.2d 628, 635 (7th Cir.1985); *In Re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir.1984). It is equally obvious that such discretion must be exercised carefully. *Klein*, 776 F.2d at 635; *In Re Grand Jury Proceedings*, 601 F.2d 162, 170 (5th Cir.1979); *cf. Nixon*, 418 U.S. at 702 (special circumstances may require appellate review to be "particularly meticulous"). Subpoenas duces tecum are not insulated from review merely because they are issued in connection with a sitting grand jury. They are issued pro forma with no prior court approval. As such they are instrumentalities of the United States Attorney's office although issued under the district court's name and for the grand jury.

The grand jury's investigative powers are broad; its inquiries generally are "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation. . . ." *Blair v. United*

States, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919); *see also United States v. Bisceglia*, 420 U.S. 141, 147, 95 S.Ct. 915, 919, 43 L.Ed.2d 88 (1975); *United States v. Powell*, 379 U.S. 48, 57, 85 S.Ct. 248, 255, 13 L.Ed.2d 112 (1964). But "the powers of the grand jury are not unlimited. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 682, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972); *accord United States v. Calandra*, 414 U.S. 338, 346, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974). The subpoena duces tecum "remains at all times under the control and supervision of a court." *United States v. Doe (Schwartz)*, 457 F.2d 895, 898 (2d Cir.1972). Beyond the explicit strictures of Fed.R.Crim.P. 17(c), the Constitution guards against abusive subpoenas duces tecum. "The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms 'to be regarded as reasonable.'" *United States v. Dionisio*, 410 U.S. 1, 11, 93 S.Ct. 764, 770, 35 L.Ed.2d 67 (1973) (quoting *Hale v. Henkel*, 201 U.S. 43, 76, 26 S.Ct. 370, 380, 50 L.Ed. 652 (1906)); *Dionisio*, 410 U.S. at 47-50, 93 S.Ct. at 789-790 (Marshall, J., dissenting).[8] And the Court has made clear

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[8] In the case of *Hale v. Henkel*, Hale received a subpoena duces tecum commanding that he bring before a grand jury:

> 1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between [his company] and six other firms and corporations named, from the date of the organization of [his company].
>
> 2. All correspondence by letter or telegram between [his company] and six other firms and corporations.
>
> 3. All reports made or accounts rendered by these six companies or corporations to the principal company.
>
> 4. Any agreements or contracts, or arrangements, however evidenced, between [his company and two others].
>
> 5. All letters received by [his company] since the date of its organization from thirteen other companies named, located in different parts of the United States, and also copies of all correspondence with such companies.

201 U.S. at 45, 26 S.Ct. at 371-72. The Court noted that a subpoena duces tecum could be an unreasonable search and seizure within the fourth amendment, and held:

> Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies. . . .
>
> [T]his mass of material . . . is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witness orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. *A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms.*

201 U.S. at 76, 26 S.Ct. at 380 (emphasis added).

that the context of the first amendment intensifies the fourth amendment concerns that may be present in a sweeping subpoena duces tecum. *Branzburg*, 408 U.S. at 707-08, 92 S.Ct. at 2669-70 ("We do not expect that courts will forget that grand juries must operate

within the limits of the First Amendment. . . .") ; *id.* at 710, 92 S.Ct. at 2671 (Powell, J., concurring).

In sum, the fact that grand juries must have broad investigative powers does not resolve all questions of the permissible breadth and requisite specificity of a subpoena duces tecum. The public's undoubted "right to every man's evidence," *Branzburg*, 408 U.S. at 688, 92 S.Ct. at 2660, does not give government, for example, "an unlimited right to access to [private parties'] papers with reference to the possible existence of [illegal] practices." *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 305, 44 S.Ct. 336, 337, 68 L.Ed. 696 (1924). "It is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up." *Id.* A court, in deciding to enforce or to quash a subpoena duces tecum that broadly seeks material presumptively protected by the first amendment, must balance these concerns: on the one hand, the interest of the public and the government in ferreting out crime, on the other, the interest of the subpoena's target in conducting a business or any other personal affairs. The critical inquiry, assuming that the hurdle of relevancy has been cleared, is whether there is too much indefiniteness or breadth in the things required to be produced by the subpoena. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505, 90 L.Ed. 614 (1945). The district court below showed no sensitivity to the need for such balancing and ordered enforcement of the subpoena on a rationale that we find chilling, as that word has come to be understood in the jurisprudence of the first amendment.

II.

The district court ordered enforcement of the subpoenas duces tecum despite the appellants' claims that they would have to spend countless hours viewing large numbers of tapes before they could know which tapes contained the subpoenaed categories of sexual activity. The district court rejected appellants' protestations on the theory that a business can be presumed to have knowledge of the specific contents of its inventory. In response to questions about burdensomeness, the government again underscored this theory in oral argument before this court.

This theory helps explain why the subpoenas duces tecum before us are not permissible. These subpoenas duces tecum are examples of those "legal devices and doctrines, in most applications consistent with the Constitution," but "which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith v. California*, 361 U.S. 147, 150-51, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). *Smith* forthrightly rejects the rationale urged by the government and applied by the district court in these cases to find that the subpoenas were not burdensome. That rationale is that a seller of books or movies can be presumed to have knowledge of all the contents of his ware. This presumption flies in the face of an important tenet of our system of free expression: "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Id.; see also Winters v. New York*, 333 U.S. 507, 510, 517, 518, 68 S.Ct. 665, 667, 671, 761. 92 L.Ed 840 (1948).

Like the statute struck down in *Smith*, the practice of issuing subpoenas like these and then expecting

vendors to comply based on their imputed knowledge of the contents of their inventories would tend seriously to restrict the dissemination of books and movies that are not obscene. Book and movie sellers would have an incentive "to restrict the books [or movies they] sell to those [they] have inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." *Smith*, 361 U.S. at 153, 80 S.Ct. at 218; *see also A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210, 84 S.Ct. 1723, 1725, 12 L.Ed.2d 809 (1964) ("State regulation of obscenity must 'conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.' ") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963)).

Thus, even though the subpoenas duces tecum herein involved do not amount to a "prior restraint" on publication,[9] they exert a powerful chilling effect

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[9] The government sought only one copy of every requested tape. This distinguishes this case from those cases involving massive seizures of books that amounted to prior restraint. *See, e.g., A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). The "substantial restraint" that a party must prove in order to invoke the nearly absolutely prohibition against pre-publication hindrances is absent from these cases. *See New York v. P.J. Video*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986); *Heller v. New York*, 413 U.S 483, 490, 93 S.Ct. 2789, 2793, 37 L.Ed.2d 745 (1973). *But see Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973) ("[W]ithout the authority of a constitutionally sufficient warrant, [seizure] is plainly a form of prior restraint and is, in those circumstances, unreasonable under fourth amendment standards.").

as enforced by the district court. First amendment rights do not vanish completely in the absence of prior restraint. *See, e.g., Heller v. New York*, 413 U.S. 483, 492, 93 S.Ct. 2789, 2795, 37 L.Ed.2d 745 (1973) (seizure of a single copy of a film is constitutionally permissible "if pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party"). First amendment rights need "breathing space to survive," *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), and courts are to protect them "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental influence." *Bates v. Little Rock*, 361 U.S. 516, 522, 80 S.Ct. 412, 416, 4 L.Ed.2d 480 (1960). The Supreme Court has demonstrated its willingness to curtail investigations by means of subpoenas, even those issued by legislative bodies, when the means of investigation intrude on the first amendment rights of parties who have not been demonstrated to have acted illegally. *See Gibson v. Florida Investigation Committee*, 372 U.S. 539, 544, 545, 558, 83 S.Ct. 889, 899, 9 L.Ed.2d 929 (1963). The task of weighing competing concerns in a case such as this one is "delicate and difficult" and a court must not give short shrift to the party asserting private constitutional rights. *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939).

III.

The absence of a prior restraint also diminishes, but does not cancel, the fourth amendment concerns [10] presented by overly broad subpoenas duces tecum directed to material [11] presumptively protected under

[10] The sine qua non of such concerns is an expectation of privacy on the part of the party asserting the fourth amendment. *See United States v. Miller*, 425 U.S. 435, 443, 444 n. 6, 96 S.Ct. 1619, 1624, 1625 n. 6, 48 L.Ed.2d 71 (1976) ("narrowly directed subpoenas duces tecum"); *United States v. Dionisio*, 410 U.S. 1, 13-15, 93 S.Ct. 764, 771-772, 35 L.Ed.2d 67 (1973). But overbreadth in a subpoena duces tecum can itself require attention to fourth amendment standards of reasonableness. *See Dionisio*, 410 U.S. at 15 n. 13, 93 S.Ct. at 772 n. 13; *Hale v. Henkel*, 201 U.S. at 77, 26 S.Ct. at 380 (1906). In many cases similar to this one there will be no expectation of privacy, because the goods seized will have been held out to the public for sale. However, this is the case envisioned by *Dionisio* and *Hale* in which the subpoenas duces tecum go beyond matters held out to the public. The government made this clear at oral argument when it denied that it could have simply purchased hardcore tapes from Model Distributors and Metro Video Distributors. The government suggested that the appellants may have tapes that were not up for sale, but that should go before the grand jury. To the extent that this is true, some of the subpoenaed material is not held out to the public and its seizure is subject to fourth amendment concerns. To the extent it is not true, the tapes could have been procured in a less onerous manner.

[11] The subpoenas duces tecum are actually directed, of course, to corporations in this case. Corporations do not have the equivalent privacy rights of individuals. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 407 (1950) (noting, however, that an overly broad investigation exceeds the government's power and that the demands or requests for information must be "not too indefinite"). But unlike the fifth amendment, which is wholly inapplicable to artificial entities, there are fourth-amendment-

the first amendment. When governmental searches trench on first amendment concerns, courts have been careful to scrutinize the searches much more closely than the district court did in this case. "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment . . . requirements because we examine what is 'unreasonable' in light of the values of freedom of expression." *Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973). In *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986), the Court held that a magistrate need not personally view allegedly obscene films prior to issuing a warrant authorizing their seizure, *id.* at 874 n. 5, 106 S.Ct. at 1614 n. 5, and that the standard of probable cause is the same for a seizure in a first amendment context as in any other. *Id.* But the Court reaffirmed that "[w]e have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out." *Id.* at 873, 106 S.Ct. at 1614; *see also Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n. 5, 99 S.Ct. 2319, 2324 n. 5, 60 L.Ed.2d 920 (1979) (first amendment

based reasonability limits on searches and seizures of corporate documents. *See Mancusi v. De Forte*, 392 U.S. 364, 88 S.Ct. 2110, 20 L.Ed.2d 1154 (1968); *Silverhorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920) (Holmes, J.). *But cf. United States v. Calandra*, 414 U.S. 338, 352 n. 8, 94 S.Ct. 613, 622 n. 8, 38 L.Ed.2d 561 (1974) (limiting the exclusion of evidence from a *Silverthorne* violation).

imposes special constraints on searches for and seizures of presumptively protected material); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431 (1965) (first amendment requires that the fourth amendment be applied with "scrupulous exactitude").

Even when the first amendment and fourth amendment problems raised by subpoenas duces tecum do not, in and of themselves, rise to the level of constitutional violations, the concerns that underlie those constitutional provisions must enter into the balancing of interests that is required by a motion to quash under Fed.R.Crim.P. 17(c). *See, e.g., In Re Grand Jury Matters*, 751 F.2d at 18. This rule of criminal procedure encapsulates the constitutional choices that must be made by a court reviewing a motion to quash a subpoena duces tecum. *See Oklahoma Press Publishing Co.*, 327 U.S. at 209, 66 S.Ct. at 506 ("[T]he requirement of reasonableness, including particularity in describing 'the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry"). The Court in *Oklahoma Press* adverted to the danger of overbreadth associated with subpoenas: "it can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason." *Id.* at 213, 66 S.Ct. at 508.

In these cases, the district court ordered Model Magazine to peruse what it claimed were 2,000 tapes for instances of the subpoenaed sexual activity. In the case of Metro Video, while the pool of tapes to be searched was reduced through negotiation to 141, it would still have been quite onerous to comply. The

normal subpoena duces tecum can impose heavy burdens of time and cost,[12] but these are not normal subpoenas duces tecum: they are directed to material that is presumptively protected under the first amendment. The government's strategy would impose heavy costs on distributors of videotapes simply because the government suspects some of their inventories to be obscene.

We find such a strategy to be "unreasonable and oppressive'" where, as here, there has been no attempt to take the much less drastic means of buying the tapes and then subjecting them to a determination of obscenity in the eyes of the grand jury or a magistrate before issuing a subpoena duces tecum for particular tapes. *See In Re Petroleum Products Liti-*

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[12] These subpoenas should be distinguished from tax summonses as regards the breadth of materials sought. Very broad tax summonses have been upheld against charges of overbreadth under the fourth amendment. *See, e.g., United States v. Arthur Young*, 677 F.2d 211, 216 (2d Cir. 1982) (requiring production of 250,000 pages of documents relating to the tax liability of Amerada Hess Corp. because "before the Service knows what the documents contain, it cannot describe them with any specificity"). *But see United States v. Richards*, 631 F.2d 341, 346 (4th Cir. 1980) (tax summons should be as narrow as possible); *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973) (same). The reasoning that the Second Circuit used to justify a very broad summons is inapposite in the instant case, where federal investigators could quite easily have posed as buyers and sought the most obscene literature that appellants would sell them. The literature at issue, unlike tax documents, is either available for purchase or else not held out to the public, and hence private material. *But cf. United States v. Rosinsky*, 547 F.2d 249, 253 (4th Cir. 1977) (subpoenas are analogous to tax summonses with regard to fourth amendment claims concerning handwriting exemplars).

gation, 680 F.2d 5, 8-9 (2d Cir.1982); *In Re Grand Jury Proceedings Witness Bardier*, 486 F.Supp. 1203, 1210 (D.Nev.1980); *cf. Branzburg v. Hayes*, 408 U.S. at 706-07, 92 S.Ct. at 2669 (noting Justice Department guidelines admonishing that "all reasonable attempts . . . be made to obtain information from non-press sources before there is any consideration of subpoenaing the press").[13]

IV.

We are also troubled by the vagueness of the subpoenas' requirement to turn over tapes that have "lewd or lascivious displays of genitals or the pubic area." This is inherently nonspecific; it asks a vendor to determine what judges have had great difficulty determining: that "present critical point in the compromise between candor and shame at which the community may have arrived here and now." *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y.1913) (Learned Hand, J.). One who is subpoenaed in such a fashion risks contempt for having a conception of lewdness or lasciviousness that differs from that of the community at large. A subpoena duces tecum should not require the recipient to determine at his own peril what he is to do, without clear guidelines for compliance. *See In Re Grand Jury Proceedings*, 601 F.2d 162, 170 (5th Cir. 1979); *cf. United States*

[13] Less drastic means of accomplishing governmental ends have often been required of statutes that impinge on the first amendments. *E.g., United States v. Robel*, 389 U.S. 258, 268, 88 S.Ct. 419, 426, 19 L.Ed.2d 508 (1967); *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963); *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Thornhill v. Alabama*, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); *see* Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

v. Richards, 631 F.2d 341, 346 (4th Cir.1980) ("specific questions directing the taxpayer's attention to areas of genuine concern to the Service are more appropriate than broad and general inquiries calling for subjective interpretation by the respondent under the threat of perjury"). Item 3(b)(5), which uses this "lewd or lascivious" standard, is the most egregious example of the "false particularity" of the subpoenas duces tecum before us. In general, the *categories of sexual activity* described in the subpoenas duces tecum are reasonably specific, but the *videotapes to which those categories apply* are not particularized at all. For this reason, the recipient of such a subpoena duces tecum is further placed at risk, beyond the fact that he is charged with knowledge of the contents of all his inventory. He must make judgment calls on the line between "lewd" and "erotic," at the risk of a civil contempt conviction. A subpoena duces tecum should be particular in a way that leaves as little discretion as possible to the recipient. *Cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) ("Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.").

V.

We return to the inquiry under Fed.R.Crim.P. 17(c) with this constitutional background in mind. The traditional requirements for reviewing subpoenas duces tecum against charges of burdensomeness must be applied with greater care in cases such as these. Those requirements were enumerated in *United States v. Nixon*, wherein Chief Justice Burger wrote:

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co. v. United States*, 341 U.S. 214 [71 S.Ct. 675, 95 L.Ed. 879] (1951). This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases . . .: (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials. As both parties agree, cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia*, 13 FRD 335, 338 (S.D. N.Y.1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that application is made in good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity.

418 U.S. at 699, 94 S.Ct. at 3103.[14] The subpoenas duces tecum before us in these cases must be quashed, for the presumptively protected materials they seek are otherwise procurable, and in a less intrusive manner; the specificity of the subpoenas is illusory, since the categories described do not refer to particular tapes; as a result, the corporations before us would be required to perform burdensome searches and would be at risk for failing to fulfill vague requirements; in sum, the government appears to be engaging in a paradigmatic "fishing expedition." Since the district court made no careful finding, on the record, as to how the recipients of the subpoenas duces tecum could produce the requested tapes without spending hundreds of hours viewing them, we find the refusal to quash the subpoenas duces tecum arbitrary and we reverse the conviction for civil contempt.[15] In the

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[14] The *Nixon* Court was not reviewing a subpoena duces tecum in connection with a grand jury investigation, but we find that its gloss on Fed.R.Crim.P. 17(c) is equally applicable in this case.

[15] Contrary to the concurring opinion's reading of this reversal, we do not hold that any subpoena that targets the named categories of sexual activity must be quashed, or that degrading forms of obscenity are shielded from the reach of the grand jury. We insist only that the guarantees of the first and fourth amendments not be trampled by overly broad subpoenas. In particular, we simply identify the following ways in which these subpoenas are objectionable: they put sellers of presumptively protected material at risk identifying which tapes are being sought; they attempt to force sellers with large inventories of presumptively protected material to spend unknown hours reviewing tapes on the theory that such sellers are charged with knowledge of all particulars of their inventory, despite the rule of *Smith v. California*; they show no evidence of any prior review of the subpoenaed materials by anyone other than the FBI agent

future, when the government seeks to subpoena material that is presumptively protected by the first amendment, it should do so in the least intrusive manner possible, which means, at a minimum, by identifying the requested material in a way that allows the recipient of the subpoena to know immediately whether an item is to be produced or not. And in reviewing motions to quash such subpoenas duces tecum, district courts should balance the first and fourth amendment interests at stake against the marginal gain to the issuer of the subpoena in describing the materials by means other than the title of the work.

REVERSED.

WILKENSON, Circuit Judge, concurring separately:

I too would quash the subpoena and reverse the conviction for contempt. I would do so, however, for different reasons than those advanced by the majority.

In my view, both the government and the majority are guilty of excess. The government has drafted a subpoena whose vague and subjective boundaries threaten legitimate forms of artistic expression. The majority has shielded from the reach of the grand jury the most dehumanizing forms of pornography, which Congress has repeatedly condemned and the Supreme Court has repeatedly held is unprotected.

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who believed the titles alone revealed obscenity; and they are, as the concurring opinion admits, hopelessly vague. The concurring opinion notes, in part II.C., that a grand jury subpoena must not be unduly burdensome. That opinion fails to explain, however, what is meant by this prohibition.

I would permit a grand jury to subpoena a single copy of a distributor's video tape if there is a strong possibility that the film would be obscene and the subpoena does not excessively burden the distributors. Under this standard, the grand jury's request for films that contain scenes of specific sexual acts should be upheld. There is a strong possibility that those films may be obscene and compliance with the subpoena will not burden the distributors because the acts are specifically described.

In particular, I would uphold this subpoena insofar as it seeks any sexually explicit film involving minors or any film depicting adults engaging in bestiality, masturbation, sadistic or masochistic abuse, or the various forms of sexual intercourse described in the subpoena.

The remainder of the subpoena, calling for films with "lascivious, lewd, or lustful exhibition of the genitals or pubic area" should be quashed. While no one condones such depictions, those terms are hopelessly vague, which makes compliance difficult, and may both inhibit the production of and require the surrender of films that are not obscene. Because this portion of the subpoena is invalid, I would quash the subpoena in its entirety.

I.

This case presents new and difficult questions with respect to grand jury subpoena powers. The historic deference accorded the subpoena power collides here with historic protections of First Amendment rights. It is true that the grand jury has traditionally been able to subpoena any evidence that is marginally relevant to its investigation; the Supreme Court has consistently declined to impose any restrictions on this

broad investigatory power. This tradition of deference must end, however, when a grand jury begins to investigate the content of films or other presumptively protected modes of expression.

The Supreme Court has generally accorded the subpoena powers of the grand jury great respect. "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, [the grand jury's] investigatory powers are necessarily broad." *Branzburg v. Hayes*, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). These broad powers allow the grand jury to "compel the production of evidence or the testimony of witnesses as it considers necessary or appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). The Court has been unwilling to restrict these powers because "a grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way." *United States v. Dionisio*, 410 U.S. 1, 13, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973).

The majority would require the prosecution to purchase individual tapes and submit them for prior review before a subpoena may issue. In addition to the traditional restraints upon the subpoena power, the majority has thus imposed upon the grand jury a "least drastic means" test. *Ante*, p. 1301. In doing so, the majority is marching ahead of the Supreme Court, which has not suggested a least drastic means test for grand jury investigations of obscenity and which has supported the grand jury's investigative

powers even when constitutional values may be implicated. For example, the grand jury may question a suspect outside the presence of his attorney, *United States v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212 (1975); a grand jury may use illegally-seized evidence, *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); a grand jury subpoena to testify is not a seizure under the fourth Amendment, *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); and the grand jury does not have to give *Miranda* warnings before questioning a suspect. *Mandujano*, 425 U.S. at 580-81, 96 S.Ct. at 1778.

In keeping with this spirit of deference, the circuit courts have also allowed a grand jury to subpoena virtually any relevant evidence. "Once it is shown that a subpoena might aid the grand jury in its investigation, it is generally recognized that the subpoena should issue." *In re Antitrust Grand Jury Investigation*, 714 F.2d 347, 350 (4th Cir.1983). The party seeking to quash a subpoena must usually show that the requested information bears "no conceivable relevance to any legitimate objective of investigation by the federal grand jury." *In re Liberatore*, 574 F.2d 78, 83 (2d Cir.1978); *In Re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 330 (6th Cir.1984). If we applied this lenient standard, Metro Video and Model Distributors would have to comply with the subpoena because the requested tapes are at least minimally relevant to the grand jury's obscenity investigation.

When applied to the run-of-the-mill grand jury subpoena, this deferential approach is certainly appropriate. A grand jury inquiry may be less intrusive and adversarial than other criminal investigations. Unlike a police investigation, the grand jury does not

stake out residences and businesses; procure evidence under false identities and pretenses; search homes, offices, or automobiles; or arrest suspects.

In particular, a grand jury subpoena may be a less drastic means of investigating obscenity violations than would purchases by the police. A subpoena remains subject to judicial control. *See Dionisio*, 410 U.S. at 9-11, 93 S.Ct. at 769-70. A subpoena by its terms limits what must be produced, while the only limit on a prosecutor's purchases is the size of his budget. Moreover, a narrowly crafted and openly served subpoena will inhibit the sale and distribution of protected materials far less than a random series of surreptitious purchases by prosecutors and police. Why the majority takes any comfort in police purchases of tapes and films is inexplicable.

Although a grand jury subpoena may be an appropriate form of investigation, it nonetheless raises substantial First Amendment concerns in this case. When the grand jury subpoenas the films or cassettes sold by a distributor, it does more than require the distributor to deliver one copy of these items; it puts the distributor and everyone in the community on notice that if they continue to sell such matter, they will be investigated and prosecuted. So long as the objects of the subpoena power are patently obscene, such *ad terrorem* tactics may escape constitutional censure. But the border zones of constitutional liberty must remain free of encroachment. Faced with sufficiently broad subpoenas and sufficiently serious threats of indictment, not only distributors—but the general community of artists, sculptors, painters and photographers may be reluctant to render erotic or sensual depictions of any sort, including those that would not be found obscene. Subpoenas of this kind could deal a

terrible blow to the vitality of artistic life, for the artist's imagination should not be chained to what conventional tastes deem polite and acceptable.

Despite the strong tradition of judicial deference, therefore, a grand jury does not have the unlimited right to chill protected speech. *See In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir.1985); *Ealy v. LittleJohn*, 569 F.2d 219, 226-27 (5th Cir. 1978). A grand jury subpoena is "not . . . some talisman that dissolves all constitutional protections." *Dionisio*, 410 U.S. at 11, 93 S.Ct. at 770. Like any instrument of government, the grand jury must abide by the limits of the First Amendment. "No governmental door can be closed against the Amendment. No governmental activity is immune from its force." *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir.1972). As the Supreme Court has explicitly noted, "we do not expect courts will forget that grand juries must operate within the limits of the First Amendment." *Branzburg*, 408 U.S. at 708, 92 S.Ct. at 2670.

Of course, the First Amendment does not prevent a grand jury from investigating criminal obscenity violations; the purveyors of obscenity cannot use the First Amendment as a shield against all governmental inquiry. A grand jury may subpoena certain categories of films, but only where there exists a strong possibility that those films may be obscene and where the subpoena is not excessively burdensome.

II.

The difficulty in this case, therefore, is determining when the grand jury's need for the films outweighs the restrictive effect of its subpoena. Two circuit courts have dealt with grand jury investigations that infringed on the First Amendment rights of speech

and association. Under the approach applied in these cases, a grand jury could investigate in a protected area if (A) the subpoena served a compelling state interest, (B) it requested evidence that was substantially related to the investigation, and (C) it did not unduly burden the witness. *In re Grand Jury Proceedings*, 776 F.2d 1099 (2nd Cir.1985); *Bursey v. United States*, 466 F.2d 1059 (9th Cir.1972). This approach is appropriate here because it allows a grand jury to subpoena films that will directly assist its obscenity investigation, but prevents the grand jury from inhibiting the circulation of expression that may well not be obscene.

A.

The first element of this approach requires that the subpoena must serve a compelling state interest. Most grand jury subpoenas satisfy this initial requirement because, if the grand jury is conducting a good faith investigation of crime, the subpoena serves a compelling state interest. *Branzburg*, 408 U.S. at 700, 92 S.Ct. at 2666; *In re Grand Jury Proceedings*, 776 F.2d at 1103. The determination of whether a compelling state interest is present does not turn on what type of crime the grand jury is investigating; the courts will not assign different values to a grand jury subpoena depending on the particular crime under investigation. *Branzburg*, 408 U.S. at 705-06, 92 S.Ct. at 2668-69.

This requirement is only intended to prevent a grand jury from issuing a subpoena for the sole purpose of harassment and intimidation. *Cf. Ealy v. LittleJohn*, 569 F.2d 219, 227-30 (5th Cir.1978). The subpoena issued in this case serves a compelling state interest; there is every reason to believe that the

grand jury is investigating Metro and Model for criminal activity in violation of 18 U.S.C. § 1465 (1982), which prohibits the interstate sale or distribution of obscene materials.

B.

If the grand jury is conducting a good faith investigation into possible criminal activity, the second element of the test allows it to subpoena films that are substantially related to the investigation. This element strikes the essential balance between the purposes of the grand jury and the protections of the First Amendment. Under this balance, the grand jury cannot restrict presumptively protected modes of expression simply because there is a slight chance that the film will assist the investigation. To subpoena such films, the grand jury must show a strong possibility that the requested films will expose criminal activity. *In re Grand Jury Proceedings*, 776 F.2d at 1103; *Bursey*, 466 F.2d at 1083.

Because the grand jury is conducting an obscenity investigation, the subpoenaed films are substantially related only if there is a strong possibility that the films are obscene. Of course, this is an area where definitional difficulties abound. The Supreme Court has struggled mightily to locate the point of protection along the continuum of speech. *See, e.g., Roth v. United States*, 354 U.S. 476, 487-89, 77 S.Ct. 1304, 1310-11, 1 L.Ed.2d 1498 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413, 418-20, 86 S.Ct. 975, 977-78, 16 L.Ed.2d 1 (1966); *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973); *New York v. Ferber*, 458 U.S. 747, 764-65, 102 S.Ct. 3348, 3358, 73 L.Ed.2d 1113 (1982); *Pope v. Illinois*,

—— U.S. ——, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987).

The prevailing definition of obscenity remains, of course, that of *Miller v. California*. The government attempts to resolve the definitional difficulty by tracking *Miller* in its subpoena and by describing specific sexual acts. In my judgment, this approach encounters several difficulties. I do not understand the *Miller* standard to be purely prescriptive, at least for the terms of a grand jury subopena. It was designed for use by a trier of fact evaluating a specific film, not for a grand jury trying to corral specific categories of films.

Moreover, the subpoena here lacks several *Miller* safeguards. Under the *Miller* test, a film is obscene if the average person, applying contemporary standards, would find that the film, taken as a whole, appeals to the prurient interest; if the film depicts patently offensive sexual conduct as defined by state law; and if the film, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L. Ed.2d 419 (1973); *See also Pope v. Illinois*, —— U.S. ——, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987) (applying a reasonable person standard to the third *Miller* requirement). While the subpoena describes certain "patently offensive [sexual] conduct," the requirement that the film, as a whole, lack literary or artistic merit is nowhere in evidence. Nor is there a requirement that the film, as a whole, appeal to the prurient interest.

These various shortcomings preclude, in my judgment, the simple enforcement of this subpoena on the authority of *Miller*. They do not, however, justify the sweeping invalidation of the subpoena ordered by the

majority. Much of the subpoena demonstrates the strong probability of obtaining highly relevant criminal evidence.

If any film is substantially related to an obscenity investigation, it is a film of bestiality, sadomasochistic sexual abuse, or child pornography. *See New York v. Ferber*, 457 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Congress has specifically targeted child pornography by prohibiting the advertisement or distribution of any depiction of a child engaged in sexually explicit conduct. 18 U.S.C.A. §§ 2251-52 (West Supp.1987). These portions of the subpoena simply do not suffer the problems of substantial overbreadth which would cause the Supreme Court to invalidate them. *See Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.E.2d 830 (1973). Thus, the subpoena's request for films with scenes of bestiality, sadistic or masochistic abuse, or minors engaged in any sexual exhibition or activity should be upheld.

Similarly, I would allow the grand jury to subpoena films involving masturbation and the specified forms of sexual intercourse. By listing these specific sexual acts, the grand jury has limited its subpoena to the mechanical depictions of sexual activity and abuse that usually appear solely in hardcore pornography. Such sexual activity is obviously not synonymous with obscenity, but it is a *sine qua non*. By quashing any subpoena that targets specifically the filmed depiction of the sexual practices most likely to be associated with obscenity, the majority has seriously impaired the grand jury from accomplishing the investigative purposes that Congress entrusted to it.

On the other hand, the grand jury has subpoenaed films containing lascivious or lewd exhibitions of the

genitals or pubic area. Divorced from the *Miller* safeguards and the *Miller* context, this portion of the subpoena might apply to any film that contains a scene of physical nudity or intimate affection. Sex may be a *sine qua non* of obscenity, but it is hardly synonymous with it. Great works of art illustrate the grace and beauty of the human body, even as there remains the potential for prurient exploitation of it. The line between the two is often difficult to draw; here, if anywhere, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Because this portion of the subpoena may easily apply to films that are not substantially related to an obscenity investigation, it should be quashed.

C.

The third and final requirement is that a grand jury subpoena not be unduly burdensome. The First Amendment prevents the grand jury from either requesting an excessive number of tapes or from issuing a subpoena with overly vague terms.[1] See *In re Rabbinical Seminary*, 450 F.Supp. 1078, 1084 (E.D.N.Y. 1978). A vague subpoena would require the distributor to implement a subjective legal standard, which he is poorly trained to do, and would ultimately force the distributor to choose between producing any film that may conceivably be obscene or assuming the risk of a subsequent contempt proceeding for inadequate compliance.

[1] The burden imposed by a request for an excessive number of obscene tapes is different than the burden posed by a vaguely worded subpoena. The burdensomeness of a request on a particular distributor is primarily a factual inquiry; the burdensomeness caused by the vagueness of a subpoena is primarily a question of law. By announcing on appeal that even the specifically-drawn portions of this subpoena are excessively burdensome, the majority has not only usurped the role of district courts, but provided distributors of any size with almost a per se defense against subpoenas whose terms are in no way overbroad or vague.

I cannot tell from this record whether compliance with this subpoena would be excessively burdensome on these defendants. The district court never made a finding on the number of films involved; Model and the government apparently disagree on the total number, with estimates ranging from 313 to over 2,000 tapes. In addition, there has been no finding on how difficult it would be for Metro and Model to screen their inventory of sexually explicit tapes. The distributors may or may not already know the contents of each video cassette, either from the display or from prescreening the films to satisfy future customer requests. When the record is undeveloped, an appellate court is a particularly poor place to judge this aspect of the burdensomeness inquiry, which emphasizes fact finding and is best resolved by the district court in its traditional role as supervisor of the grand jury. *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1984).

An appellate court does not need findings of fact to determine whether a subpoena's terms are overly vague. The majority apparently believes that the subpoena would be more precise if it requested specific titles rather than specific acts. The request for films with bestiality, masturbation, and specific forms of intercourse, however, is not vague; these are specific acts that are readily identifiable.[2] This portion of the subpoena leaves no doubt about what films are

[2] Although it may be argued that the request for X-rated films with sadistic and masochistic sexual abuse is vague, that portion of the subpoena should be upheld. The government has an undeniably compelling interest in prosecuting the sale of such dehumanizing films that outweighs the burden on the film distributors.

involved. A distributor may have to look for these acts, but he will know them when he sees them.

The subpoena's request for films with lewd or lascivious exhibitions of the genitals or pubic area, however, is too vague. This section requires a film distributor to make a subjective decision about when an exhibition is lewd or lascivious and when it is not. The vice of a vague subpoena is that it may require a seller or distributor to surrender protected items. Because this request forces a distributor into overcompliance to avoid a contempt charge, it should be quashed. "When First Amendment interests are at stake, the government must use a scalpel, not an ax." *Bursey*, 466 F.2d at 1088.

III.

Obscenity law is a persistent area of tension. There will always be a public clamor to curb the degradation of human dignity and the exploitation of sexual expression that pornography represents. There will always be the danger that popular attempts to suppress it will bring down the censor's hand upon protected speech. There must always be courts to draw difficult lines, no matter how frustrating the attempt. Because the majority forsakes that task for a broad and blanket condemnation of this subpoena, I respectfully submit this separate statement.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE:
GRAND JURY 87-4
(John Doe 1094)

MOTIONS HEARING

June 17, 1988

Before: Claude M. Hilton, Judge

• • • • •

[15] THE COURT: Okay. As far as—I don't think I need to hear any additional argument as far as these records subpoenas are concerned. I have read the submissions and I think I am clear in my mind what should be done about the records subpoenas.

It would seem to me that that first subpoena has very little effect other than, as the Government has indicated this morning, that as far as the effective date of it is concerned, I will consider that that first subpoena is simply merged into the second subpoena and forms only a date for the production. And I don't find that this subpoena is overly broad.

If this subpoena would require the shutting down of the operation and involved some kind of prior restraint or would tie up the company to the extent that it has been represented that it could if they have to take that information off of their computers, but the Government has offered to do that. And computers go from one tape to another, you can make

three of them at one time. And all you have to do is to press a button. And you can produce those tapes to the Government, I believe, without much difficulty. [16] I believe that the time constraints on this information is not unreasonable. And the motion to quash the records subpoena will be denied.

* * * * *

[19] THE COURT: As far as these 193 tapes are concerned, I believe that this subpoena does set forth, of course, with specificity the tapes that are to be produced in accordance with what the Fourth Circuit has indicated that is necessary.

I also think that the Government has made sufficient representations that in connection with the viewing of tapes supplied in the other investigation involving *Pryba* and others which has been referred to here, and their review of the titles of these tapes, that there is sufficient reason to think that these tapes are relevant to the investigation, and it is sufficiently specific. And your motion to quash this subpoena would be denied.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: GRAND JURY,
87-3, John Doe 1094

July 8, 1988

Before: The Honorable James C. Cacheris, United States District Judge

[20] THE COURT: * * *

This matter is before the Court on the motion of R [21] Enterprise, doing business as Coast-to-Coast Video to quash a grand jury subpoena duces tecum directed to it. The case comes as a matter that has been reviewed by the Fourth Circuit in the case of In Re Grand Jury Subpoena Duces Tecum, 829 F.2d 1291, Fourth Circuit, 1987. The issues involving some of this case are involved.

In that case, let me put the quote in, at page 1295: For purposes of this appeal, we deal only with those items in the subpoenas duces tecum calling for production of videotapes, packaging in which these tapes are contained, and documents relating to tapes involving listed categories of sexual activity. The requests for business records otherwise appear to be clearly delineated and not overly burdensome. It is only as to those items that require a prior identification of videotapes that we are troubled.

The argument of R Enterprises is they have done no business in Virginia and that the government has not met its burden of, in essence, overcoming the

three hurdles of relevancy, admissibility, what have you; that's found on page 1301 of this opinion, that they have not overcome that burden.

The government's response to that is that they have the affidavit of Agent James Clemente in which he says, for purposes of this case, that he went and saw Mr. Rothstein at the 148 Lafayette Street address in New York and told [22] Rothstein that he had subpoenas for Model Magazine Distributors Inc., Coast-to-Coast Video and MFR Books, at which point he said it's all the same thing, I'm president of all three. Then he served him with a subpoena.

The evidence further stipulated is that the evidence would show from the Pryba case that Model sent material to Pryba in Maryland who, in return, distributed it to Virginia.

I think on the basis of Rothstein's statement there's sufficient connection with Virginia for further investigation by the grand jury, and I think that the fact that other judges have ruled on this, and that this case has been pending for two-and-a-half years and appears to be the same arguments raised in the other ones, I'm going to go ahead and deny the motion to quash at this time, noting R Enterprises' exception.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Grand Jury 87-4

IN RE: GRAND JURY INVESTIGATION,
JOHN DOE 1094
(Model Magazine Distributors)

and

GRAND JURY INVESTIGATION,
JOHN DOE 1094
(R Enterprises, Incorporated)

and

GRAND JURY INVESTIGATION,
JOHN DOE 1094
(MFR Court Street Books, Incorporated)

August 12, 1988

BEFORE:

THE HONORABLE T.S. ELLIS, III,
Presiding United States District Judge

[21] THE COURT: • • •

All right. This matter, this particular matter is here on the motion to quash by MFR Court Street Books, Inc. It is a subpoena for business records, as modified here orally in open court by the United States. And it is challenged on the ground essentially that it is a fishing expedition. And as the

movant has put it, the grand jury in the Eastern District of Virginia investigating obscenity should not, is not empowered to subpoena all the business records of an intrastate New York bookstore engaged only in sales in New York without any showing as to relevance.

The United States takes the position that they don't have to make a showing, any threshold showing of relevance and cite a number of cases in support of that. There is no Fourth Circuit decision directly in point. The *In re Grand Jury Subpoena* decision that appears at 829 Federal Second was superseded by subsequent opinion as a [22] result or owing to the narrowing of the issue that was ultimately presented.

I don't remember, Mr. Leiser, right off the bat—I don't believe this, there was anything else said other than it was superseded. Is that correct?

* * * * *

The subsequent opinion appears at 844 Federal Second 202. And that opinion indicates that their resolution of the matter rests only on the ground that lewd and lascivious is impermissibly vague and overbroad.

And the opinion specifically declines to address any further questions raised in this case prior to the government's approval. And the obvious implication of that [23] is that the Fourth Circuit does not intend that their opinion at 829 Federal Second 1291 have controlling effect.

Nonetheless, it isn't something, as I indicated earlier, Mr. Leiser, in another hearing, that the Court is likely to ignore.

That majority opinion does suggest that some threshold showing of relevancy is required.

The opinion, the authority cited by the United States suggests that the majority of the jurisdictions do not require such a threshold showing. And this Court would be inclined to agree with that.

But quite apart from that, assuming, even assuming that the Fourth Circuit would require a threshold showing of relevance, this Court goes on to determine whether such a showing of relevance has been made in this case. And it ultimately concludes that it has on the basis of the evidence that makes clear that the related entities—which the movant argues are not related, are separate entities—one of the related entities certainly did ship sexually explicit material into the Commonwealth of Virginia. And in addition, there was the statement to the, the authorities that the entities were related. Whether that in fact turns out to be the case or not is unclear.

But the subpoena has been tailored as modified by the United States in open court, to its dealings with [24] respect to Virginia. And in that context, the Court finds that there has been an adequate showing of threshold relevance. And it may be that, when the custodian appears and testifies, the dealings of MFR will have nothing whatever to do with the governments' investigation of possible illegality in connection with the shipment of obscene material in Virginia.

In reaching this conclusion, the Court also has considered and has reviewed the *FTC against American Tobacco Company* case, which is distinguishable. And in any event, the government here does not have, is not seeking to have unlimited access for the purpose of a fishing expedition. There is a threshold showing in this instance.

Nor does the Court believe that there is in this connection any impermissible chilling of First Amend-

ment rights. There isn't, as the Fourth Circuit has already found, there isn't indefiniteness and burdensomeness involved in this subpoena, and this Court agrees with that finding.

So the Court denies the motion to quash these, this subpoena for the business records of MFR.

* * * * *

[74] THE COURT: * * *

The Court finds on the basis of the submissions and the arguments made that indeed the three entities in this matter—that is Model Magazine Distributors, R Enterprises, Inc., and MFR Court Street Books, Inc.—have refused to produce material responsive to the subpoenas, which subpoenas have been found by Judge Hilton and Judge Cacheris on two different occasions, each of the subpoenas on one occasion, to be reasonable and not to warrant granting a motion to quash.

Nonetheless, the three entities have deliberately and intentionally and contumaciously determined not to produce it but rather to take a stand and to press this [75] issue. And so the Court finds each of those entities in contempt and imposes a fine of $500 per day so long as that contumacious, contemptuous conduct continues and advises, as you know, Mr. Schwarz and Mr. Fahringer, that that contempt, of course, can be stopped at any time by indicating a willingness to produce.

But I am going to stay the imposition of the fine pending an opportunity for these litigants to have their issues heard on appeal. There is no doubt in my mind that delay in the overall scheme of things, Mr. Leiser, might be something that's desirable to these movants and that they wish to take advantage of.

But I'm satisfied that in this instance the three entities are willing to proceed promptly with this matter. And the schedule that I will establish will ensure that that's the case.

Nor can the Court conclude that the matter is frivolous. This is an area in which there isn't a controlling decision directly in point on these issues unless the view is taken that this Court takes, namely, that these are fairly standard business subpoenas to a grand jury and ought to be complied with.

And I think there has been adequate showing, even if a showing were required, that the materials for MFR should be produced and also certainly an *a fortiori* [76] case for the other two entities.

Nonetheless, the Court does feel strongly that these parties ought to have their opportunity to have this matter heard on appeal before suffering the penalties of contempt. And accordingly, it does stay.

Now, the stay will be in effect only until the 22nd of August. It may be that some matters heard by the Fourth Circuit prior to that time will automatically dispose of these matters. I don't know. But that should give the parties sufficient time to take an expedited appeal to the Fourth Circuit.

In fact, I'd make it sooner than the 22nd except that this being the latter part of August, the Fourth Circuit judges in a panel of three—I don't, I don't have in mind an appeal to a single judge whose authority would only be to grant a stay. I'm doing that. The appeal I have you in mind taking is an appeal on the merits. And that will require a panel of three.

Now, with respect to Mr. Rothstein, I am of the view that Mr. Rothstein is the moving force behind the contemptuous and contumacious behavior. I believe Mr. Rothstein is the appropriate person to be

held ir contempt because as the sole stockholder/ president of these corporations, he's clearly the person who's taking the position that is contemptuous.

[77] Nonetheless, I will take under advisement whether he is to be held in contempt. I want to give you an opportunity, Mr. Leiser—I've given Mr. Fahringer an opportunity, and he has argued on the matter with respect to the lack of the Court's authority.

I'll take the matter under advisement. And should it be necessary, or should the Court be persuaded that it has the power to hold Mr. Rothstein in contempt, then I'll do so—I don't need any further oral argument—and I will order him incarcerated as provided in 1826.

But I would stay that also. I certainly do not want anyone incarcerated if there is—I want to give an opportunity to appeal. Indeed, I've done that in other matters where I have—it's got to be fairly frivolous, Mr. Leiser, before I'm going to take that position.

So what I'm doing is giving you an opportunity to submit additional material to persuade the Court that under 1826 it has the authority. I'm sympathetic to the substance of your arguments. Certainly in a functional sense, you're correct. But the Court has to be sensitive to the limits on its power and cannot issue punitive sanctions where it doesn't have the power to do so.

If it has the power to do so though, Mr. Fahringer, I'm indicating to you that I won't hesitate to do so and will do it for the length of the grand jury or 18 [78] months, whichever is less, as I recall the statute, and I would stay the imposition of that pending the appeal.

Now, if for some reason attributable to the Fourth Circuit, not attributable to the parties, but if for some

reason attributable to the Fourth Circuit—namely, that a panel is not available—then you will need to return to this Court to explain that and to see whether this Court's willing to extend its stay. In all likelihood, I would. But I'm of the view—and I think it's correct—that the Fourth Circuit can accommodate a full panel hearing in that timeframe.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5619

In Re: GRAND JURY 87-3 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLANT

No. 88-5620

In Re: GRAND JURY 87-4 SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

UNDER SEAL, DEFENDANT-APPELLANT

Filed: Dec. 12, 1989

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Murnaghan, and Wilkins voted to rehear the case in banc; Chief Judge Ervin and Judges Winter, Phillips, Sprouse, Chapman, and

Wilkinson voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Phillips and Judge Wilkinson.

For the Court,

JOHN M. GREACEN
Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

TO: MFR Court Books, Inc.
148 Lafayette Street
New York, New York

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE

U.S. Federal Grand Jury
200 S. Washington Street
Alexandria, Virginia 22314

COURTROOM

DATE AND TIME

May 9, 1988
at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Any and all originals and all copies made before service of this subpoena in the actual or constructive possession of Model Magazine Distributors, Inc., Coast to Coast Video and MFR, Court Books, Inc., (the Corporations), for the period from April 1, 1984 to the current date of this subpoena, as listed below:

1. All corporate ledgers and journals, including but not limited to the General ledger, cash receipts journal, sales journal, cash disbursements journal, voucher register, and any other ledgers and journals maintained by the corporations.

2. All banking records, including but not limited to bank statements, cancelled checks, check vouchers, check books, stubs and/or registers, deposit tickets, savings account books, certificates of deposit and any other time deposits purchased or redeemed and records of any safe deposit boxes.

3. All records of loans and mortgages received and given by the Corporations including any and all correspondence related to such loans.

4. All financial statements.

5. All corporate contracts and lease agreements.

6. All records relative to the acquisition or sale of real and/or leasehold property, either improved or unimproved, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust, and correspondence, memoranda, notes of meetings and/or telephone calls relating to or connected in any way with the acquisition or sale of property.

7. All sales invoices (not previously furnished), expense invoices and paid and unpaid bills.

8. All records of shipment.

9. All records of purchases of inventory and goods held for resale, including but not limited to, invoices from vendor, records of receipt, and records of material returned to the supplier.

10. All records relating to travel and entertainment expenses paid by or incurred on behalf of the Corporations, including but not limited to, vouchers, memoranda, correspondence and records of payment.

11. Copies of all federal, state and local tax returns for fiscal years ending March 31, 1986, 1987 and 1988 (when filed).

12. All records of investments made by or on behalf of the Corporations.

13. All records of asset acquisition, including but not limited to, fixed asset ledger, records of asset purchases or acquisition, records of assets sold or disposed of.

14. All files, correspondence, agreements, contractor or other records of consultants with/or of the Corporations.

15. All Articles of Incorporation, Minutes of Stockholders Meetings, Banking Resolutions, Corporate Ledger/Binders; Stock Certificate Ledger or Record, copies of annual reports and resolutions appointing directors and officers of the Corporations (not previously furnished):

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

DORIS CASEY
Clerk

(By) Deputy Clerk

Date
4/22/88

This subpoena is issued on application of the United States of America

Name, Address and Phone Number of Assistant U.S. Attorney

Lawrence J. Leiser (703) 557-9100
Assistant United States Attorney
701 Prince Street
Alexandria, Virginia 22314

RETURN OF SERVICE [1]

RECEIVED BY SERVER

DATE
4/25/88

PLACE
26 Federal Plaza NY, NY 10278

SERVED

DATE
4/26/88

PLACE
148 Lafayette St. NY, NY 5th Floor

SERVED ON (NAME)
Martin Rothstein, President

SERVED BY

TITLE

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL

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[1] As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

DECLARATION OF SERVER [2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 4/26/88
Date

Signature of Server

26 Federal Plaza
Address of Server

[2] "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

TO: Coast to Coast Video
148 Lafayette Street
New York, New York

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

COURTROOM

PLACE

U.S. Federal Grand Jury
200 S. Washington Street
Alexandria, Virginia 22314

DATE AND TIME

May 9, 1988
at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

* If not applicable enter "none".

Any and all originals and all copies made before service of this subpoena in the actual or constructive possession of Model Magazine Distributors, Inc., Coast to Coast Video and MFR, Court Books, Inc., (the Corporations), for the period from April 1, 1984 to the current date of this subpoena, as listed below:

1. All corporate ledgers and journals, including but not limited to the General ledger, cash receipts journal, sales journal, cash disbursements journal, voucher register, and any other ledgers and journals maintained by the corporations.

2. All banking records, including but not limited to bank statements, cancelled checks, check vouchers, check books, stubs and/or registers, deposit tickets, savings account books, certificates of deposit and any other time deposits purchased or redeemed and records of any safe deposit boxes.

3. All records of loans and mortgages received and given by the Corporations including any and all correspondence related to such loans.

4. All financial statements.

5. All corporate contracts and lease agreements.

6. All records relative to the acquisition or sale of real and/or leasehold property, either improved or unimproved, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust, and correspondence, memoranda, notes of meetings and/or telephone calls relating to or connected in any way with the acquisition or sale of property.

7. All sales invoices (not previously furnished), expense invoices and paid and unpaid bills.

8. All records of shipment.

9. All records of purchases of inventory and goods held for resale, including but not limited to, invoices from vendor, records of receipt, and records of material returned to the supplier.

10. All records relating to travel and entertainment expenses paid by or incurred on behalf of the Corporations, including but not limited to, vouchers, memoranda, correspondence and records of payment.

11. Copies of all federal, state and local tax returns for fiscal years ending March 31, 1986, 1987 and 1988 (when filed).

12. All records of investments made by or on behalf of the Corporations.

13. All records of asset acquisition, including but not limited to, fixed asset ledger, records of asset purchases or acquisition, records of assets sold or disposed of.

14. All files, correspondence, agreements, contracts or other records of consultants with/or of the Corporations.

15. All Articles of Incorporation, Minutes of Stockholders Meetings, Banking Resolutions, Corporate Ledger/Binders; Stock Certificate Ledger or Record, copies of annual reports and resolutions appointing directors and officers of the Corporations (not previously furnished).

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

DORIS CASEY
Clerk

Date 4/22/88

This subpoena is issued on application of the United States of America

Name, Address and Phone Number of Assistant U.S. Attorney

Lawrence J. Leiser (703) 557-9100
Assistant United States Attorney
701 Prince Street
Alexander, Virginia 22314

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

To: Custodian of Records
R Enterprise, Inc.
148 Lafayette Street
New York, New York

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place

U.S. District Court
200 S. Washington Street
Alexandria, Virginia

Courtroom

Date and time

July 19, 1988
9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): *

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* If not applicable enter "none".

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk

Doris R. Casey, Clerk of Court

(BY) DEPUTY CLERK

Date

June 27, 1988

This subpoena is issued on application of the United States of America	Name, address and phone number of assistant U.S. Attorney
United States Attorney	Lawrence J. Leiser, Asst. U.S. Atty. 1101 King Street, Ste. 502 Alexandria, VA 22314 (703) 557-9100

Subpoena Attachment

Any and all originals and all copies made before service of this subpoena in the actual or constructive possession of R Enterprises, Inc. for the period from April 1, 1984 to the current date of this subpoena, as listed below:

1. All corporate ledgers and journals, including but not limited to the General ledger, cash receipts journal, sales journal, cash disbursements journal, voucher register, and any other ledgers and journals maintained by the corporations.

2. All banking records, including but not limited to bank statements, cancelled checks, check vouchers, check books, stubs and/or registers, deposit tickets, savings account books, certificates of deposit and any other time deposits purchased or redeemed and records of any safe deposit boxes.

3. All records of loans and mortgages received and given by the Corporations including any and all correspondence related to such loans.

4. All financial statements.

5. All corporate contracts and lease agreements.

6. All records relative to the acquisition or sale of real and/or leasehold property, either improved or unimproved, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust, and correspondence, memoranda, notes of meetings, and/or telephone calls relating to or connected in any way with the acquisition or sale of property.

7. All sales invoices [] not previously furnished), expense invoices and paid and unpaid bills.

8. All records of shipment.

9. All records of purchases of inventory and goods held for resale, including but not limited to, invoices from vendor, records of receipt, and records of material returned to the supplier.

10. All records relating to travel and entertainment expenses paid by or incurred on behalf of the Corporation, including but not limited to, vouchers, memoranda, correspondence and records of payment.

11. Copies of all federal, state and local tax returns for fiscal years ending March 31, 1986, 1987, and 1988 (when filed).

12. All records of investments made by or on behalf of the Corporations.

13. All records of asset acquisition, including but not limited to, fixed asset ledger, records of asset

purchases or acquisition, records of assets sold or disposed of.

14. All files, correspondence, agreements, contracts or other records consultants with/or of the Corporations.

15. All Articles of Incorporation, Minutes of Stockholders Meetings, Banking Resolutions, Corporate Ledger/Binders; Stock Certificate Ledger or Record, copies of annual reports and resolutions appointing directors and officers of the Corporations (not previously furnished).

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

To: Custodian of Records
Model Magazine Distributors, Inc.
148 Lafayette Street
New York, New York

Subpoena To Testify
Before Grand Jury

Subpoena for:

☒ Person
☒ Document(s) or
object(s)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Place	Courtroom
U.S. District Courthouse	Date and Time
200 S. Washington Street	June 12, 1988
Alexandria, Virginia 22314	at 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): *

One copy of each individual title that is listed in the Attached Model Invoices. If invoice lists title in Beta Format, supply in VHS format if available, if not in Beta format.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk	Date
Doris Casey	6/2/88

By: Deputy Clerk

This subpoena is issued on application of the United States of America	Lawrence J. Leiser (703) 557-9100 Assistant United States Attorney 1101 King Street, Suite 502 Alexandria, Virginia 22314

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 778